









PRINCIPLES  
OF THE  
COMMON LAW

[Originally based on Indermaur's Common Law]

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## PREFACE

IN the present edition this book is published in one volume. Parts I and II deal with the general principles of the Law of Contracts and Torts. The outline of the law of evidence which followed has been omitted from this edition.

Part III of the book deals with Mercantile Contracts, constituting the remainder of the book, including a new section on Hire, Hire-Purchase and Credit Sales. There has also been included, for the sake of completeness, Part IV dealing with Arbitration. It is hoped that Parts III and IV will meet the requirements of examinations in Commercial Law.

In this edition Mr. Barry Chedlow has been responsible for Part III, Chapters II, III, and IV (Master and Servant; Indemnity, etc., Bailments, etc.), Chapter V, Sections II, III (Hire, Hire-Purchase, etc., Liens, etc.) and Chapter VI (Negotiable Instruments) and Part IV (Arbitration) and also for the Table of Cases and Index.

A. M. WILSHERE.



## TABLE OF CONTENTS

	PAGE
PREFACE ... ..	iii
TABLE OF CASES ... ..	xi

INTRODUCTION ... ..	1
---------------------	---

## PART I.—CONTRACTS

## CHAPTER

## I.—THE NATURE OF A CONTRACT—THE DIFFERENT KINDS OF CONTRACT.

Sect. I.—The Nature of a Contract—The Classification of Contracts—The General Conditions for the Maintenance of an Action of Contract in Modern Law	17
Sect. II.—Simple Contracts ... ..	24
Sub-sect. 1.—The Parties to an Agreement ... ..	24
Sub-sect. 2.—The Formation of a Simple Contract ... ..	26
Sub-sect. 3.—Consideration ... ..	41
Sub-sect. 4.—When Writing is necessary for Simple Contracts or their proof ... ..	52
Sect. III.—Specialty Contracts ... ..	68
Sect. IV.—Implied Contracts ... ..	74
Sect. V.—Contracts of Record ... ..	82
Sect. VI.—Construction of Documents ... ..	90
Sect. VII.—The Operation and Effect of Contracts ... ..	99

## II.—MISREPRESENTATION AND FRAUD—MISTAKE.

Sect. I.—Misrepresentation and Fraud ... ..	102
Sub-sect. 1.—What Amounts to a Misrepresentation ... ..	108
Sub-sect. 2.—Remedies for Misrepresentation and Fraud ... ..	108
Sub-sect. 3.—Equitable Fraud ... ..	111
Sub-sect. 4.—Duress ... ..	115
Sect. II.—Mistake ... ..	116
Sub-sect. 1.—Contracts Affected by Mistake ... ..	118
Sub-sect. 2.—Money Paid under a Mistake ... ..	124
Sub-sect. 3.—Mistake of Expression—Rectification ... ..	125

## III.—CAPACITY TO CONTRACT.

Sect. I.—Infants ... ..	128
Sect. II.—Married Women ... ..	137
Sub-sect. 1.—The Law before 1935 ... ..	137
Sub-sect. 2.—The Modern Law ... ..	142
Sect. III.—Persons of Unsound Mind or Drunk ... ..	143

CHAPTER	PAGE
III.—Capacity to Contract— <i>cont.</i>	
Sect. IV.—Convicts .. .. .	144
Sect. V.—Aliens .. .. .	144
Sect. VI.—Corporations and Unincorporated Associations ..	146
Sub-sect. 1.—Corporations .. .. .	146
Sub-sect. 2.—Unincorporated Associations .. .. .	149
Sect. VII.—Professional and Occupational Incapacities ..	150
IV.—UNLAWFUL AGREEMENTS.	
Sect. I.—Agreements Illegal at Common Law .. .. .	160
Sect. II.—Agreements Illegal by Statute .. .. .	160
Sect. III.—Agreements Void at Common Law .. .. .	163
Sect. IV.—Agreements Void by Statute .. .. .	176
Sect. V.—Consequences of Unlawfulness .. .. .	185
V.—ASSIGNMENT OF CONTRACT .. .. .	192
VI.—DISCHARGE OF CONTRACT AND OF RIGHTS OF ACTION ARISING FROM BREACH OF CONTRACT.	
Sect. I.—Discharge of Contract .. .. .	203
Sect. II.—Discharge of Rights of Action .. .. .	226
Sect. III.—Survival of Right of Action .. .. .	233
VII.—REMEDIES FOR BREACH OF CONTRACT.	
Sect. I.—Common Law Remedies .. .. .	234
Sect. II.—Equitable Remedies .. .. .	244

## PART II.—TORTS

I.—INTRODUCTION.	
Sect. I.—Liability in Tort .. .. .	246
Sub-sect. 1.—The difference between a Breach of Contract and a Tort .. .. .	246
Sub-sect. 2.—Torts which are also Criminal Offences ..	248
Sub-sect. 3.—The Conditions for the Maintenance of an Action of Tort .. .. .	250
Sub-sect. 4.—Who may Sue and be Sued in Tort .. .. .	260
Sub-sect. 5.—General Exceptions to Liability and Defences—Torts committed Abroad—Survival of Rights of Action .. .. .	267
Sect. II.—Remedies for Torts .. .. .	282
Sect. III.—Liability for Torts of Others .. .. .	292
II.—TRESPASS, DETINUE, AND CONVERSION.	
Sect. I.—Trespass .. .. .	305
Sub-sect. 1.—Trespass to the Person .. .. .	305
Sub-sect. 2.—Trespass to Land .. .. .	312
Sub-sect. 3.—Trespass to Goods—Replevin .. .. .	321
Sect. II.—Detinue and Conversion .. .. .	324
Sect. III.—Wrongful Distress .. .. .	333

# TABLE OF CONTENTS

vii

CHAPTER	PAGE
III.—NUISANCES—THE RULE IN <i>RYLANDS V. FLETCHER</i> —INTERFERENCE WITH EASEMENTS AND NATURAL RIGHTS.	
Sect. I.—Nuisance ... ..	335
Sub-sect. 1.—Public Nuisances ... ..	337
Sub-sect. 2.—Private Nuisances ... ..	340
Sect. II.—The Rule in <i>Rylands v. Fletcher</i> ... ..	345
Sect. III.—Interference with Natural Rights and Easements	350
Sub-sect. 1.—Water ... ..	351
Sub-sect. 2.—Support ... ..	355
Sub-sect. 3.—Light and Air ... ..	357
Sub-sect. 4.—Rights of Way ... ..	358
IV.—NEGLIGENCE AND ABSOLUTE DUTIES OF SAFEGUARDING OTHER PERSONS ... ..	360
Sect. I.—General Conditions for the Maintenance of an Action of Negligence ... ..	360
Sect. II.—Special Duties and Liabilities.	
Sub-sect. 1.—Duties Attached to the Ownership and Occupation of Property ... ..	380
Sub-sect. 2.—Dangerous Things—Fire ... ..	389
Sub-sect. 3.—Animals ... ..	392
V.—INDUCING BREACH OF CONTRACT—INTERFERENCE WITH FREEDOM OF ACTION—INTERFERENCE WITH DOMESTIC RELATIONSHIPS AND CONTRACTS OF SERVICE—SEDUCTION.	
Sect. I.—Inducing Breach of Contract and Interference with Freedom of Action ... ..	398
Sect. II.—Interference with Domestic Relationships and Contracts of Service—Seduction ... ..	405
VI.—IMPROPER USE OF LEGAL PROCESS.	
Sect. I.—Malicious Abuse of Legal Process ... ..	410
Sect. II.—Maintenance and Champerty ... ..	415
VII.—FRAUD—PASSING-OFF ACTIONS.	
Sect. I.—Fraud ... ..	420
Sect. II.—Passing-off Actions ... ..	422
VIII.—DEFAMATION AND OTHER ACTIONABLE LANGUAGE.	
Sect. I.—Defamation ... ..	425
Sect. II.—Language Actionable on other Grounds ... ..	448

## PART III.—MERCANTILE CONTRACTS

I.—PRINCIPAL AND AGENT ... ..	451
Sect. I.—Creation of Agency ... ..	451
Sect. II.—Duties of Agent to Principal ... ..	453
Sect. III.—Rights of Agent against Principal ... ..	462



CHAPTER	PAGE
<b>I.—Principal and Agent—<i>cont.</i></b>	
Sect. IV.—Relations between Principal and Third Parties	467
Sect. V.—Relations between Agent and Third Persons	179
Sect. VI.—Determination of Agency	485
Sect. VII.—Mercantile Agents	488
Sect. VIII.—Married Women	490
Sect. IX.—Solicitors	493
Sect. X.—Partners	495
<b>II.—MASTER AND SERVANT.</b>	
Sect. I.—The Contract between Master and Servant	512
Sub-sect. 1.—Creation, Duration and Termination of the Contract	512
Sub-sect. 2.—The Duties of Master and Servant	519
Sect. II.—Injuries to a Servant whilst in his Master's Employment	524
Sub-sect. 1.—The Position at Common Law	525
Sub-sect. 2.—The Position by Statute	531
<b>III.—CONTRACTS OF INDEMNITY AND SURETYSHIP—CONTRACTS OF INSURANCE.</b>	
Sect. I.—Contracts of Indemnity and Suretyship	544
Sect. II.—Contracts of Insurance	552
Sub-sect. 1.—Marine Insurance	559
Sub-sect. 2.—Fire Insurance	570
Sub-sect. 3.—Life Insurance	572
Sub-sect. 4.—Accident Insurance	575
<b>IV.—BAILMENTS—CONTRACTS OF CARRIAGE AND AFFREIGHTMENT.</b>	
Sect. I.—General Rules Applicable to Bailments	583
Sect. II.—Innkeepers	589
Sect. III.—Contracts of Carriage	595
Sect. IV.—Contracts of Affreightment	613
Sub-sect. 1.—Charterparties	614
Sub-sect. 2.—Bills of Lading	619
Sub-sect. 3.—Freight	623
Sub-sect. 4.—Liabilities of the Shipowner as Carrier	626
<b>V.—SALE OF GOODS—HIRE, HIRE-PURCHASE, CREDIT SALES—PLEDGES AND MORTGAGES OF CHATTELS.</b>	
Sect. I.—Sale of Goods	636
Sub-sect. 1.—Formation of the Contract	637
Sub-sect. 2.—Effects of the Contract	652
Sub-sect. 3.—Performance of the Contract	662
Sub-sect. 4.—Rights of Unpaid Seller against the Goods	665
Sub-sect. 5.—Actions for Breach of Contract	672
Sub-sect. 6.—Auction Sales	675

# TABLE OF CONTENTS

ix

CHAPTER	PAGE
V.—Sale of Goods, etc.— <i>cont.</i>	
Sect. II.—Hire-Purchase—Credit Sales ... ..	677
Sub-sect. 1.—Hire ... ..	677
Sub-sect. 2.—Hire-Purchase ... ..	680
Sub-sect. 3.—The Hire-Purchase Act, 1938 ... ..	684
Sub-sect. 4.—Credit Sales ... ..	696
Sect. III.—Lien—Pledges and Mortgages of Goods ... ..	697
Sub-sect. 1.—Lien ... ..	697
Sub-sect. 2.—Pledges of Goods ... ..	700
Sub-sect. 3.—Mortgages of Chattels—Bills of Sale ... ..	704
VI.—NEGOTIABLE INSTRUMENTS ... ..	722
Sect. I.—Bills of Exchange ... ..	726
Sub-sect. 1.—Form and Interpretation ... ..	726
Sub-sect. 2.—Capacity and Authority of Parties ... ..	741
Sub-sect. 3.—Consideration ... ..	744
Sub-sect. 4.—Negotiation of Bills ... ..	748
Sub-sect. 5.—General Duties of the Holder ... ..	751
Sub-sect. 6.—Liabilities of Parties ... ..	759
Sub-sect. 7.—Discharge of Bill ... ..	762
Sub-sect. 8.—Acceptance and Payment for Honour ... ..	764
Sub-sect. 9.—Lost Instruments ... ..	765
Sub-sect. 10.—Bills in a Set ... ..	765
Sub-sect. 11.—Conflict of Laws ... ..	766
Sect. II.—Cheques ... ..	766
Sect. III.—Promissory Notes ... ..	776

## PART IV.—ARBITRATION

Sect. I.—Definition and Classification ... ..	778
Sect. II.—The Arbitration Agreement ... ..	781
Sect. III.—Arbitrator and Umpire ... ..	794
Sect. IV.—Conduct of the Arbitration ... ..	801
Sect. V.—The Award ... ..	801
Sect. VI.—Special Case ... ..	810
Sect. VII.—Costs ... ..	812
Sect. VIII.—Statutes of Limitation in regard to Arbitration	813

## INDEX

817



## TABLE OF CASES

A.		PAGE	PAGE	
Aaron's Reefs v. Twiss .....	101.	105	Allbutt v. Gen. Med. Council ....	441
Aas v. Benham .....		508	Allcard v. Skinner .....	114
Abbott v. Wolsey .....		639	— v. Walker .....	123
Aboulon v. Oppenheimer .....		89	Allen v. Flood .....	252, 253-4, 400-1
Abraham v. Bullock .....	296,	299	— v. Jackson .....	167
Abrahams v. Deakin .....		291	Allester, <i>Re</i> .....	700, 701, 707
Adam S.S. Co. v. Westville S.S. Co. ....		110	Allgemeine, etc., Gesellschaft v. Adm. of German Property .....	193
Adair v. N. E. Ry. ....		412	Allison v. Bristol Marine Ins. ...	625
Acry v. Ferme .....		169	Alkins v. Jupe .....	462
Ackroyd v. Smith .....		359	Allnutt v. Ashenden .....	552
— v. Smithus .....		215	Altree v. Altree .....	718
Adamson, <i>Ex p.</i> .....	55, 56		Ambatielos v. Anton Jurgens, etc., Works .....	95
— v. M. Rice .....		651	Amber Size Co. v. Munzel .....	462
Adair v. Blundell .....	252, 351		Amicable Soc. v. Bolland .....	574
Adam v. Newbigging .....		501	Amys v. Barton .....	533
— v. Ward .....	431, 438, 442, 445, 447, 448		Anderson, <i>Ex p.</i> .....	86
Adams v. Catley .....		791	— v. Daniel .....	162, 186
— v. Lanes, & Yorks. Ry. ....		375	— v. Gorrie .....	268
— v. Lindell .....		34	— v. Martindale .....	25
— v. Morgan .....		468	— v. Pacific Ins. Co. ....	105
— v. Navar .....		382	Andrew v. Fairworth Soc. ....	533, 538
Adda v. Dumore & Co. ....	382-3, 385, 388		— v. Ramsay .....	461
Adams v. Gramophone Co. ....		256, 518	Andrews v. Mitchell .....	802
Admiralty v. Green, <i>Ex p.</i> S.S. America ..	219, 287, 405, 406		— v. Mockford .....	106
— v. Sofia Thronon .....		508	— v. Singer & Co. ....	612
— v. S.S. Susquehanna .....	237-8		Anzel v. Jay .....	110
— v. S.S. Vulcan .....		376	Angell v. Duke .....	57
Adams, The .....	92, 93		Anglesey (Marquis), <i>Re</i> .....	75, 234
Adams v. Reus v. Walford ..		163	Angus v. P. & O., etc., Co. ....	681
Adams v. Western Railway ..		241	Anglo-Danubian v. Ministry of Food .....	617
Adams v. Johnson .....		306	Anglo-Newfoundland Co. v. Pacific S. Nav. ....	377
Adams v. Peck Motors .....	296, 299		— v. R. ....	792
Adams v. Worsley .....		642	Anglo-Saxon Petroleum v. Dawson ..	569
Adams v. O'Brien, Harding ..		621	Anguilla v. Estate, etc., Agencies ..	192
Adams v. Reid v. Ats .....		619	Anzani v. McLachlan .....	591, 700
Adams v. Haynes .....		417	Ansell v. Evans .....	783
Adams v. Supply Co. v. Hunt ..	218, 468, 471, 600, 700		Apothecaries' Co. v. Gre. nough ..	153
Adams v. G. W. R. ....		535	Appelbe v. Percy .....	305
Adams v. W. G. R. ....		358	Appleby v. Franklin .....	249
Adams v. Anti-Slavery Damp-Proof Hansa .....		619	— v. Johnson .....	37
— v. B. & L. ....		769	— v. Myers .....	81, 224
— v. J. & S. ....		434-5	Appleton v. Binks .....	480
— v. N. E. Ry. ....		436	Arcos v. Ronaaen .....	664
— v. R. & S. ....	177-190		Ardan S.S. Co. v. Weir .....	618
— v. S. & S. ....		327	Ardath Tobacco Co. v. Ocker ....	658
— v. W. & L. ....		461	Argonaut-Navigation v. Ministry of Food .....	618
Adams v. Liverpool Overseers ....		58	Aria v. Bridge House Hotel ....	591
			Arkwright v. Gell .....	358
			— v. Newbold .....	103



## TABLE OF CASES

xiii

PAGE	PAGE
Bank of England v. Vachano 728, 732. 767	Baynes v. Brewster ..... 309, 311
Bank of Montreal v. Exhibit Co. 761	Bazeley v. Forder ..... 401
Bank of New Zealand v. Simpson 60	Beadle v. United Kingdom Alliance ..... 430
Bank v. Mullar ..... 738	Beal v. S. Devon Ry. .... 365
Bann v. Dalziel ..... 81	Beaman v. A. R. T. S. .... 231, 277
Banque Jacques Cartier v. Banque d'Epargne ..... 474	Beard v. L. G. O. Co. .... 295, 299
Barber v. Lamb ..... 87	Beardley v. Baldwin ..... 755
— v. Penby ..... 338	Beatty v. Beatty ..... 87
Barbour v. S. E. Ry ..... 508	Beaufort (Duke) v. Neeld ..... 471
Barclay v. Pearson ..... 189-90	Beaumont v. Reeve .... 11, 45, 168, 177
Barclay v. Brighton Corp. .... 530	Bebo v. Sales ..... 389
Baring v. Corrie ..... 188, 698	Becher, Gray Co. v. London Assce. Corpn. .... 564
— v. Denton ..... 788	Bechuanaland Co. v. London Trading Bank ..... 5, 728
Barker v. Furlong ..... 328	Beck v. Pierce ..... 141
— v. McArthur ..... 627	Beckett, <i>Id.</i> ..... 493
Barlway v. S. W. Transport .. 969	Beckett v. Tower Assets Co. .... 709
Bar's v. v. Yum ..... 54, 61	Beckham v. Drake ..... 24, 195, 518
Barward, <i>Id.</i> ..... 737	Beckwith v. Philby ..... 312
Barry v. Irvel, etc., Water Board ..... 390	Beddall v. Mantland ..... 318
— v. Lamb ..... 394	Beeston v. Beeston ..... 191
— v. Nurnery Colliery .. 736, 537	— v. Collier ..... 514
— v. Richards ..... 115	Beetham v. James ..... 107-8
— v. Tye ..... 129	Begbie v. Phosphate Sewage Co. 160
— v. Ward ..... 439	Behn v. Burness .... 102, 108, 226, 616
Bernett v. Glen ..... 289	Behnke v. Bode S.S. Co. .... 639, 640
— v. Goldsmith & Co. .... 317	Behrens v. Richards ..... 292
— v. Howard ..... 140	Belcham and Gawley's Contract, <i>Re</i> ..... 101
— v. Isaacson ..... 463	Belcher v. Rodian ..... 786
— v. Sanku ..... 188	Belfast, etc., Ry. v. Keep ..... 611
Barnett v. Glen ..... 165	Bell v. Bals ..... 68, 152, 486, 489
— v. L. P. .... 117	— v. Lever Bros. .... 118, 119
Barnes, L. & Co. v. Philips 642	— v. Midland Ry. .... 284
Barnes v. T. P. Co. .... 353, 354	Belamy v. Debenham ..... 40
— v. W. S. .... 186	Benaim v. Debeno ..... 667
Bassett v. Matthews ..... 111	Benham v. Gambling ..... 281
Bassett v. Co. S. N. .... 318	Benjamin v. Storr ..... 385-6
Bass v. Co. S. N. .... 358	Bennett v. South ..... 158
Bass v. Co. S. N. .... 82, 85	Bentall v. Vicenty ..... 464
Bass v. L. & Co. v. Pumping Works ..... 516	Bentley v. Craven ..... 459, 460
Bass v. H. S. .... 78	Bent v. Hogan ..... 528
Bass v. B. S. .... 336	Benson v. Taylor ..... 617
— v. H. S. .... 197	Beresford v. Royal Insurance 163, 574
Battams v. Battams ..... 164	Berg v. Sailer ..... 177, 188
Battams v. James ..... 65	Berkley v. Hardy ..... 468, 480
Battams v. James ..... 614, 622	Bernal v. Pini ..... 625
— v. G. P. S. .... 614	Bernardi v. Natl. Sales Corpn. .. 749
Baynes v. L. & S. W. Bank .... 739	Bernina, The ..... 372, 376
Bayn v. L. & S. W. Assce. Co. .. 556	Berry v. Berry ..... 204
Baxter v. Bennett ..... 749	— v. Da Costa ..... 286
Baxter v. Gapp ..... 456	— v. Hamm ..... 290
— v. N. S. .... 514	Bertie v. Beaumont ..... 317
— v. T. S. .... 317	Bessler v. S. Derwent Coal Co. 204
Bayly v. Manchester, etc., Ry 294, 296	Bethell v. Clark ..... 670
Bayly v. B. S. W. .... 454	Betts v. Met. Police District Receiver ..... 278-9

	PAGE		PAGE
Bevan v. Carr .....	56	Bodega Co., <i>Re</i> .....	13, 121
— v. Webb .....	453	Boden v. Henshy .....	137
Beverington v. Dale .....	656	— v. Roscoe .....	319
Bexwell v. Christie .....	454	Bodley v. Reynolds .....	352
Beyfus v. Lodge .....	104	Boissevain v. Weil .....	146, 210
Bianchi v. Offord .....	719	Bolckow v. Seymour .....	42
Bidder v. Bridges .....	214	Bolton v. Lambert .....	175
Biddle v. Bond .....	587	— v. Madden .....	46
Biggar v. Rock Life Ins. Co. ....	556	Bond v. Douglas .....	127
Biggerstaff v. Rowatt's Wharf ...	51	Bonita, <i>The</i> .....	476
Bignall v. Gall .....	308	Bonnard v. Dott .....	156, 190
Bilbee v. Hassey .....	465	Bonser v. Cox .....	559
Bilbie v. Lumley .....	124	Boone v. Eyre .....	206
Birch v. Liverpool (Earl) .....	55, 678	Boosey v. Wood .....	273, 435
Bird v. British Celanese .....	522	Booth v. Arnold .....	151
— v. Brown .....	474, 475	Borries v. Imp. Ottoman Bank ..	165
— v. Holbrook .....	384	Bostel v. Horlock .....	161
— v. Jones .....	309	Bostock v. Nicholson .....	674
Birmingham Banking Co., <i>Ex p.</i> ..	457	Boston v. Boston .....	57, 58
Birmingham Corp'n. v. Allen .....	356	Boston Fishing Co. v. Ansell ..	461, 516
Birmingham Excelsior Soc. v. r. Lane .....	141	Boswell v. Coaks .....	235
Birmingham Vinegar Co. v. Powell .....	422-1	Bottomley v. Hannister .....	394
Bishop v. Anglo-Eastern Trading	38	— v. Brougham .....	149
— v. Cunard White Star .....	290	Bonahon v. Boughton .....	197
Bishopsgate v. Transport Brakes ..	658	Boulton's Case .....	16
Bisset v. Wilkinson .....	105	Boulton v. Jones .....	121
Blackburn v. Mason .....	151	Bourgeois v. Weddell .....	796
— v. Scholes .....	486	Bourne, <i>Re</i> .....	510
— v. Vigors .....	178	Bousfield v. Wilson .....	156
— v. Walker .....	61	Bouzoum v. Ottoman Bank .....	523
Blackburn Bobbin Co. v. Allen ..	209	Bow's Emporium v. Brett .....	165
Blades v. Higgs .....	309, 324	Bowater v. Rowley Regis Corpora- tion .....	271, 328
Blake v. Gale .....	110	— v. Wycombe Motors .....	699
— v. Midland Ry. ....	290	Bowen v. Hall .....	254
Blakemore v. Bristol and Exeter Ry. ....	588	— v. Owen .....	220
Blanchard v. Sun Fire .....	795	Bower v. Peate .....	350
Blackensee v. L. & N. W. Ry. ....	602	Bowes, <i>Re</i> .....	698
Blankenstein v. Robertson .....	717, 718	— v. Foster .....	217
Blay v. Pollard .....	122	— v. Shand .....	92, 616
Bleachers' Assocn. v. Chapel-en- le-Frith R. D. C. ....	351	Bowler v. Lovegrove .....	170
Bliss v. Hall .....	311	Bowman v. Secular Society .....	157
Bloodworth v. Gray .....	434	— v. Taylor .....	71
Blouet v. Sawyer .....	535	Bowler v. Cook .....	218
Blower v. G. W. Ry. ....	598, 599	Boxsius v. Goblet Frères .....	116
Blundy v. L. & N. E. Ry. ....	254, 256, 258	Roy Andrew v. St. Rognvald .....	371
Blyth v. Birmingham Water- works .....	284, 367, 369	Boyce v. Paddington Boro Co. ....	335
— v. Fladgate .....	494	Boydell v. Drummond .....	55, 67
Boaler v. Mayor .....	551	Boyers v. Duke .....	23
Board of Education v. Rice .....	786	Boynton v. Richardson .....	755
Board of Trade v. Cayzer .....	814	Brace v. Calder .....	226, 578
Bobbett v. Pinkett .....	772	Braccgirdle v. Heald .....	56
Bock v. Gorrisen .....	698	— v. Hincks .....	9
Boddington, <i>Re</i> .....	711	Brackenborough v. Spallin g U. D. C. ....	392-3
		Bradburn v. G. W. Ry. ....	233
		Bradburne v. Botfield .....	21, 25
		Bradford Corporation v. Ferrand	351
		— v. Myers .....	279

## TABLE OF CASES

XV

	PAGE		PAGE
Bradford Corporation v. Pickles	254, 384	British Waggon Co. v. Lea	192
Bradford Old Bank v. Sutcliffe	201	British Westinghouse Co. v. Underground Railways	235
Bradlaugh v. Newdegate	417	British & Bennington's v. N. W. Cachar Co.	201
Brady v. Todd	468, 476	Brittain v. Lloyd	78
Braithwaite v. Foreign Hardware Co.	661	— v. Rossiter	56, 68
Branca v. Cobano	40	Britten v. G. N. Ry.	613
Brandao v. Barnett	698	Broad v. Thomas	463
Brandon v. Osborne	373	Broadbent v. Ramshotbam	351
Brandt v. Dunlop Rubber Co.	198	Broadwood v. Granara	591
— v. Liverpool, etc., Co.	627	Brogden v. Metropolitan Ry.	75
— v. Morris	181, 183	Bromage v. Prosser	253
Brennan v. Gilbait-Smith	515	Bromley v. Mercer	328
Brettel v. Williams	505	— v. Smith	131
Brewster v. Drennan	393	Brook v. Hook	160, 474, 742
Brice v. Bannister	197	Brooke v. Pool	300, 365
Bridger v. Savage	456	— v. Brooke	705
Bridges v. Hawkesworth	331	Brooker v. Scott	129
Brier, <i>Re</i>	153	Brookman v. Mather	182
Briggs v. Calverly	219	Brooks, <i>Ex p.</i>	658
Bright, <i>Ex p.</i>	189	Brown v. Kennedy	150
— v. River Plate	795	Brown v. Brandt	589
Brighton Marine Palace v. Woodhouse	791	— v. Byrne	76, 97, 463
Brighty v. Norton	96	— v. Dimbleby	140
Brimelow v. Casson	399, 402	— v. Eastern Midlands Ry.	339
Brinsmead v. Harrison	265, 333	— v. Giles	393
Bristol A. B. Co. v. Maggs	40	— v. Hawkes	118
Bristol Corpn. v. Aird	792	— v. Robins	357
Bristol and Exeter Ry. v. Collins	600	— v. Tibbitts	152
Bristol Tram Co. v. Fiat	636, 648, 650, 651	— v. Vause	806
Bristow v. Eastman	261	Thorne, <i>Re</i> (1904)	183
— v. Whitmore	176	— v. Dawson	316
Bristove v. Fairclough	88	— v. Meverell	778
Britannia v. Mandler	755	Brownlie v. Campbell	103, 107
British Bank v. Novum	50	Brunner v. Moore	92, 97
British Cash Conveyors v. London	115-7	Brunsdon v. Humphrey	89
British Celanese v. Moneroff	525	Brunswick (Duke) v. Harmer	427
British Columbia Electric Co. v. Leach	373-4	Bryant v. Flight	463, 513
British Columbia Saw Mills v. Newell	240	— v. Herbert	325
British Concrete Co. v. Schell	171	— v. Lefever	358
British Dock Ins. Co. v. Dunder	557	— v. Richardson	129
British Electric Co. v. Gentile	287, 289	Bubb v. Yelverton	197
British Movietone v. London Cinema	76, 205	Buckingham v. Surrey and Hants Canal	515
British Railway, etc., Co. v. The C. R. Co.	149	Buckland v. Guildford	365, 382
British Russian Gazette v. Ascol. Newspapers	226	— v. Johnson	87
British South Africa Co. v. Companhia de Moçambique	279	Buckle v. Holmes	393-4
— v. De Beers	147	Buckner v. Ashby & Horner	363
British Stamp, etc., Co. v. Haynes	235	Bull v. Price	464
British Trade Comm., <i>Re</i>	731, 776	Bull Coal Co. v. Osborne	277
		Bull v. Morell	737
		Burchell v. Gowrie and Blockhouse Collieries	465
		— v. Thompson	72, 711, 717
		— v. Wilde	510
		Burdick v. Garrick	460
		Burritt v. Killie	391
		Burge v. Ashley	183



	PAGE		PAGE
Burgess v. Clements .....	591	Campbell v. Mersey Docks ....	653
— v. Gray .....	301	— v. Rothwell .....	551
Burland v. Earle .....	160	— v. Spottiswoode .....	337
Burley v. Stepney Corpn. ....	599	Can. Pac. Ry. v. Lockhart .....	297
Burn v. Burn .....	168	— v. Roy .....	391
Burnard v. Haggis .....	264	Canada and Dominion v. Canadian	
Buron v. Denman .....	267	National S.S. ....	620
Burr v. Smith .....	440	Cannan v. Bryce .....	176, 181
Burroughes v. Bayne .....	326-7	Canning v. Farquhar .....	557
Burrows v. Barnes .....	702	Cannon v. Villars .....	358
— v. Lang .....	353-4	Capital and Counties Bank .	
— v. Rhodes .....	267	Henty .....	431
Burton v. English .....	635	Capper v. Wallace .....	96
— v. Henson .....	306	Captain J. A. Cates Co. v.	
— v. Knight .....	795	Franklin Ins. Co. ....	566
— v. Pinkerton .....	211	Carbide Trading v. Birmingham	791
Butcher v. Butcher .....	316	Carlgarth, The .....	3-4
— v. L. & S. W. Ry. ....	612	Carlill v. Carbolic Smoke Ball Co.	
Butler v. Fife Coal Co. . . 255-7, 361,		28-9, 35, 11, 175	
367, 525		Carlisle v. Salt .....	101
— v. Standard, etc., Cables 313, 344		Carlisle Banking Co. v. Bragg .	122
Butterfield v. Forrester .....	371	Carlton Club v. Laurence ....	181, 185
Butterknowle Colliery v. Bishop		Carmichael's Case .....	186
Auckland Co. ....	353	Carnell v. Harrison .....	133
Butterley v. New Hucknall Co. .	96	Carney v. Plimmer .....	181
Butterworth, Re .....	73	Carpenter v. Deen .....	712, 719
Butwick v. Grant .....	470	— v. Haymarket Hotel ....	591, 592
Buxton v. Baughan .....	699	Carpenters v. British Mutual	
— v. Rust .....	64	Banking Co. ....	775
Bygraves v. Dicker .....	304	Carr v. Broderick .....	679
Byrne, Ex p. ....	717	— v. Jackson .....	182
— v. Boadle .....	368	— v. Lynch .....	60
— v. Schiller .....	624	Carrol v. Bird .....	516
— v. Van Tienhoven ....	33, 37	Carruthers v. Newen .....	194
Bywell Castle, The .....	376	Carslake v. Mapledoram .....	134
		Carter v. Johnson .....	322
		— v. Silber .....	132, 1
		— v. Wake .....	701
		— v. Whalley .....	507
		Cattwright v. Cattwright ....	168
		— v. Hoogstoel .....	33
		— v. Regan .....	715
		Carus Wilson & Green, Re ....	796
		Cassels v. Holden Wood Co. . .	699
		Cassidy v. Daily Mirror . . .	130-2
		Casswell v. Chesine Lanes . .	604, 613
		Castellam v. Preston ....	557, 559, 572
		Castle v. Swonder .....	5-4
		Caswell v. Powell Duffryn ....	306, 7,
		371, 377, 529, 531	
		Catalina and Norma, The . . .	502
		Caterers v. D'Ajou .....	431
		Caton v. Caton .....	55, 62
		Catterall v. Hindle .....	214
		Cavalier v. Pope .....	253, 362, 380
		Cave v. Hastings .....	65
		Cavey v. Ledbetter .....	341
		Caxton v. Sutherland Pub. Co.	
		Banking Co. Ex p. ....	276, 326, 332

## C.

Cable v. Bryant .....	358
Cadaval (Duc de) v. Collins ....	116
Cahill v. L. & N. W. Ry. ....	611
Cakebread v. Hopping .....	529
Calcutta Co. v. De Mattos .....	665
Caldar v. Halket .....	269
Caldar v. Dobell .... 24, 480, 483, 484	
— v. Rutherford .....	25
Calph, The .....	268
Callisher v. Bischoffsheim .....	51
Callo v. Brouncker .....	516
Callot v. Nash .....	491
Calye's Case .....	591
Camden v. Anderson .....	560
Camelia, The .....	568
Camillo v. Jewson .....	802
Cammell, Laird & Co. v. Man-	
ganese Co. .... 648, 650, 652	
Campbell Re, Wolverhampton	
Banking Co. Ex p. ....	188

## TABLE OF CASES

xvii

	PAGE		PAGE
Cayzer, Irvine & Co. v. Carron ..	373	City Bank v. Sovereign Life Assce. Co. ....	574
Cellular, etc., Co. v. Maxton ..	422-4	Clare v. Joseph .....	151
Cellulose, etc., Co. v. Widnes Foundry .....	243	Claridge v. Mackenzie .....	317
Central London Property v. High Trees .....	41	Clark v. Carters .....	808
Central Ry. of Venezuela v. Kisch ..	107	— v. Chambers .....	389
Century Ins. Co. v. Imperial Smelting Corporation .....	303	— v. L. G. O. Co. ....	287
Chadburn v. Moore .....	469	— v. Molyneux .....	447
Chamberlain v. Williamson .....	233	Clarke v. Army and Navy Society ..	390
— v. Young .....	784	— v. Bickers .....	25
Chambers v. Davidson .....	698	— v. Birley .....	551
— v. Donaldson .....	319	— v. Brims .....	257
— v. Goldthorpe .....	269	— v. Cobley .....	136
Chandelor v. Lopus .....	643	— v. Cuckfield Union .....	149
Chandler v. Doulton .....	334	— v. Dickson .....	110
Chaney v. Maclow .....	489	— v. Dunraven .....	26
Chant v. Read .....	130	— v. London and County Bank ..	773
Chapelo v. Brunswick Building Society .....	471, 476	— v. Taylor .....	436
Chapelton v. Barry U. D. C. ....	31	— v. Tipping .....	455
Chaplin v. Hawes .....	375	Clay v. Yates .....	638
— v. Hicks .....	288, 240-1	Clayards v. Dethick .....	376
Chapman v. Ellesmere .....	441, 445	Clayton v. Gosling .....	735
— v. Franklin .....	185	— v. Le Roy .....	323, 327, 638
— v. G. W. Ry. ....	601	Clayton and Waller v. Oliver ....	236, 239, 519
— v. Michaelson .....	156	Clayton's Case .....	218
— v. Smethurst .....	743	Cleadon Trust, <i>Re</i> .....	77
— v. Speller .....	52	Cleary v. Booth .....	274-5
Chappel v. Comfort .....	621	Cleaver, <i>Re</i> .....	718
— v. North .....	791	— v. Mutual Res. Asscn. ....	575
Chappell, <i>Re</i> .....	73	Clegg, Parkinson & Co. v. Earby Gas Co. ....	257
Chapple v. Cooper .....	128	Clemens Horst Co. v. Biddell ....	623
Chapronière v. Mason .....	649	Clements v. L. & N. W. Ry. ....	130
Charles v. Blackwell .....	771	Clifford v. Laton .....	493
Charlesworth v. Mills .....	707	— v. Watts .....	47, 207
Charrington v. Wonder .....	44	Clinton v. Lyons .....	395
Chasemore v. Richards .....	252, 354	Clissold v. Cratchley .....	414
Chatterton, <i>Ex p.</i> .....	85	Close, <i>Ex p.</i> .....	706
— v. Secretary of State for India .....	439	Clouston v. Corry .....	516
Chesman v. Exall .....	703	Clinton v. Attenborough .....	733
Cherry v. Hemming .....	56	Clyde Cycle Co. v. Hargreaves ..	129, 678
Che-lire v. Bailey .....	296, 299	Coaks v. Boswell .....	104
— v. Vaughan .....	181	Cobb v. G. W. Ry. ....	241
Child v. Affleck .....	443	Cobbett v. Clutton .....	327
Childingworth v. Escha .....	40	— v. Gray .....	306
Chinnery v. Marchioness of Ely ..	39	Coburn v. Colledge .....	227
Christel Vinnen, <i>The</i> .....	627	Cochrane v. Entwistle .....	717
Christie v. Davy .....	342	— v. Rymill .....	328-9
— v. Gifford .....	365	Cockayne v. Harrison .....	498
Christoford v. Turry .....	161	Cockburn v. Smith .....	388
Christopher v. Bare .....	307	Cocking v. Ward .....	68
Clubb v. Westley .....	447	Cockroft v. Smith .....	308
Cuthrell v. Sizemore .....	414	Cocks v. Bruce .....	496
Churchward v. Chambers .....	516	— v. Maclefield .....	805
Cipriani v. Budett .....	164	Coddington v. Palaeologo ....	93, 94, 96
Citizens' Life Assce. v. Brown ..	261	Coggs v. Bernard .....	583, 585, 588

	PAGE		PAGE
Cohen v. Kittell .....	180	Coombs, <i>Re</i> .....	513
— v. Lester .....	156	Cooper v. Chitty .....	326
— v. Roche .....	60, 62	— v. National Provincial ....	549
— v. S. E. Ry. ....	611	— v. Parker .....	215
Cointat v. Myham .....	636	— v. Phibbs .....	105, 119
Colchester Corpn. v. Brooks ..	386, 388	— v. Turner .....	217
Coldman v. Hill ....	473, 585, 586, 644	— v. Willomatt .....	326, 585
Cole v. De Trafford .....	968	Cope v. Rowlands .....	181-2
— v. Lynn .....	550	— v. Sharpe .....	319
— v. N.-Western Bank ..	623, 656	Corbet v. Packington .....	584, 588
— v. Turner .....	306	Corbett v. Burge .....	410
Coleham v. Cooke .....	735	Corea v. Peiris .....	413
Coleman v. Foster .....	320	Cork Distilleries v. Gt. S., etc., Ry. ....	600, 602
Colepepper v. Good .....	600	Corn v. Matthews .....	130
Coles v. Pack .....	552	Cornelius v. Banque Franco-Serbe .....	752, 755
— v. Trecothick .....	452	— v. Phillips .....	156
Colfar v. Coggins .....	525	Cornford v. Carlton Bank ..	261, 413
Collen v. Wright .....	479	Cornish v. Abington .....	477
Collett v. National Fur .....	589	Corpe v. Overton .....	131-5
Collier v. Sunday Referee ....	519	Corporation Agencies v. Home Bank of Canada .....	472
Collingridge v. Royal Exchange	571	Cort v. Ambergate Ry. ....	222
Collins v. Associated, etc., Race- courses .....	488	Cotterell v. Jones .....	410
— v. Blantarn .....	72, 167	Cotton v. James .....	412
— v. Brook .....	458	Coughlin v. Gillison .....	588
— v. Collins .....	778	Coulthard v. Clementson .....	552
— v. Locke .....	171, 173	Counsell v. London and West- minster Bank .....	712
Colls v. Home and Colonial Stores .....	6, 292, 342, 357	Court Line v. R. ....	565
Colonial Bank v. Cady .....	723	Countts v. Browne-Lecky .....	546
Colonial Bank of Australasia v. Marshall .....	764	— v. Irish Exhibition .....	150
Comar, <i>Re</i> .....	185	Couturier v. Hastie .....	119, 546
Comfort v. Betts .....	196	Coverdale v. Grant .....	618
Commercial Bank of Tasmania v. Jones .....	549	Cowan v. Milbourn .....	187
Commercial Credit Co. of Canada v. Fulton .....	771	Coward v. Baddeley .....	306
Compagnie du Sénégal v. Woods	792	Cowern v. Nield .....	131, 264, 678
Confians Co. v. Parker .....	728	Cowles v. Dunbar .....	312
Conley v. Barclays Bank .....	547	Cowley v. Newmarket Local Board	253
Conquer v. Boot .....	88	Cox v. Bruce .....	622
Consolidated v. Oliver's Wharf ..	596	— v. Burbidge .....	393-4
Consolidated Co. v. Curtis .....	328	— v. Coulson .....	387
— v. Musgrave .....	166	— v. Glue .....	315
Consolidated Credit Corpn. v. (Gosney) .....	718	— v. Hickman .....	501, 504
Constantine v. Imperial Hotels .....	237, 589	— v. Midland Ry. ....	168, 470
Constantine S.S. Line v. Imperial Smelting Corpn. ....	208, 411	Cox and Neve, <i>Re</i> .....	101
Conway v. Wade .....	405	Coxhead v. Mullis .....	136
Cook v. Addison .....	456	Crace, <i>Re</i> .....	552
— v. Catchpole .....	793	Craddock v. Hunt .....	126
— v. Deeks .....	460	Crage v. Meyer .....	53
— v. Eschelby .....	485	Cramb v. Goodwin .....	465
Cooke v. Mid. Gt. W. Ry. of Ireland .....	388, 390	Crane v. London Docks .....	654
— v. Wilson .....	481	— v. S. Suburban Gas Co. ..	333
		Craven Ellis v. Canons ....	50, 119
		Crawcour, <i>Ex p.</i> .....	703
		Crawshaw v. Maule .....	501
		Crears v. Hunter .....	50, 715
		Credit Co. v. Pott .....	710

	PAGE
Crediton Gas Co. v. Crediton	
U. D. C. ....	205
Green v. Wright .....	515
Cresswell v. Hedges .....	318
Crew v. Cummings .....	718
Croft v. Alison .....	298
Crofter, etc., Harris Tweed Co. v. Veitch .....	399, 400, 404
Cronmire, <i>Re</i> .....	183
Crosby v. Wadsworth .....	59
Crossley v. Lightowler .....	353
— v. Maycock .....	38
Croston v. Vaughan .....	267
Crouch v. Crédit Foncier .....	723
— v. G. N. Ry. ....	601
Crowthurst v. Amersham .....	346
Croydon Gas Co. v. Dickinson ..	550
Cruden v. Fentham .....	371
Cryan v. Hotel Rembrandt .....	590
Cubitt v. Gamble .....	219
— v. Porter .....	318
Cuckson v. Stones .....	517
Cull v. Backhouse .....	458
Cunard v. Antifyre, Ltd. ....	345, 365
Cunard S.S. Co. v. Buerger ....	628
Cundy v. Lindsay .. 23, 116, 118, 120, .....	657, 659
Curlewis v. Clark .....	214
Currie v. Misa .....	41, 216, 744
Curry v. Walter .....	440
Curtice v. London City and Midland Bank .....	768
Curtis v. Matthews .....	598
— v. Nixon .....	463
— v. Wilcox .....	260
Cusack v. Robinson .....	640
Cutler v. United Dairies ....	273, 281
Cutler v. Powell .....	223
Czarnikow v. Roth .....	164, 792, 812

**D.**

Da Costa v. Jones .....	178-9
Dadwell v. Jacobs .....	455
"Daily Telegraph" v. Mc-Laughlin .....	452
Daimler, Ltd. v. Continental Tyre Co. ....	115
Dachyl v. Labouchere .....	437-8
Dakin v. Le. ....	224
— v. Oxby .....	624
Dalby v. India, etc., Ass. Co. ....	573, 574
Dalton v. Angus .....	355, 336
— v. Irwin .....	465
Dancar's Trusts, <i>Re</i> .....	196
D'Angibau, <i>Re</i> .....	438
Daniel, <i>Re</i> .....	237
Daniell v. Sinclair .....	124 5

	PAGE
Daniels v. Potter .....	388
— v. Trefusis .....	63
Dann v. Hamilton .....	274
Dansay v. Richardson .....	590
Danube II, The .....	278
Darley Main Colliery v. Mitchell	15, 276, 355
Darlow v. Bland .....	710
Darrell v. Tibbitts .....	547
Darwen and Pearce, Re .....	531
Daun v. Simmins .....	478
Davidson v. Carlton Bank .....	719
— v. Handley-Page .....	523
— v. McRobb .....	534
Davies, <i>Ex p.</i> .....	587
— v. Beynon Harris .....	134
— v. Davies .....	22
— v. Gwauncaegurwen Colliery .....	536
— v. Humphreys .....	547
— v. Jenkins .....	717
— v. London, etc., Inscs. Co.	103, 548
— v. Makuna .....	178
— v. Mann .....	374, 377
— v. Marshall .....	514
— v. Powell Duffryn Associated Collieries .....	282
— v. Rees .....	716
— v. Swan Motors .....	379
— v. Thomas .....	399
Davis v. Davis .....	501
— v. James .....	602
— v. Marlborough (Duke) ...	166
— v. Phillips & Co. ....	640
— v. Reilly .....	217
— v. Shepstone .....	437
— v. Whitehead .....	67
Davison v. Donaldson .....	484
— v. Gent .....	317
Davys v. Buswell .....	545, 546
— v. Richardson .....	219
Dawes, <i>Ex p.</i> .....	91
Dawkins v. Lord Paulet ....	269, 439
— v. Lord Rokeby .....	439
Dawson Line v. Aktien. Adler.	622
Dawsons v. Bonnin .....	225, 553
Day v. Bram .....	427
— v. McLea .....	213
— v. Sirgleton .....	237
Dean v. James .....	219
Deane v. Clayton .....	231
Deare v. Foutten .....	493
Dearle v. Scarle .....	199
Debenham v. Mellon ..	488, 490, 491
De B aam v. Ford .....	718
Debtor, A, Re (1903) .....	83, 112
—, A, Re (1929) .....	85
—, A, Re (1937) .....	547, 639
—, A, Re (1939) .....	639

	PAGE		PAGE
De Bussche v. Alt .....	457, 460	Donoghue v. Stevenson ....	253, 361-2, 391, 569
Dealey v. Lloyds Bank .....	218	Donovan v. Laing .....	300, 302-3
Deen v. Davies .....	369, 395	— v. Union Cartage .....	286, 339
Deerhurst, Re .....	86	Dorman v. Meadows .....	422
De Francesco v. Barnum ...	181, 407	Douglas v. Corbett .....	413
Defries, Re .....	217	— v. Patrick .....	219
— v. Milne .....	200, 416	Douglas Norman & Co., Re ...	700
Degg v. Midland Ry. ....	527	Douglass v. Rhyl U. D. C. ....	119
De La Bere v. Pearson .....	42, 242	Dovaston v. Payne .....	314
De La Rue v. Hernu .....	260	Doyle v. White City Stadium	130, 131
De Mattos v. Benjamin ..	181, 182, 456	Drake, Ex p. ....	326
Demerara Bauxite Co. v. Hubbard	459	— v. Bedfordshire C. C. ..	278, 339
Den of Airlie S.S. Co. v. Mitsui ..	788	Draper v. Earl Manvers .....	150
Dennis v. White .....	538	Draupner, The .....	621
Denton v. Legge .....	792	Drew v. Nunn .....	452, 487, 188
Dering v. Earl Winchelsea .....	548	Drexel v. Drexel .....	216
Derry v. Handley .....	428	Drughorn v. Rederiaktiebolaget	
— v. Peek .....	107, 264	Transatlantic .....	483
Deslandes v. Gregory .....	482	Drummond v. Hamer .....	799
Dcseau v. Peters .....	497	Drury v. Defontaine .....	161
De Stempel v. Dunkels .....	514	Dublin Distillery v. Doherty ..	581, 707
Dewar v. Mintoft .....	60, 64-5	Dublin Ry. v. Slattery ..	361, 367, 372
Dewell v. Saunders .....	386	Duck v. Mayeu .....	265
Deyong v. Shenburn .....	526	Dudley v. Folliott .....	6-9
Diamond, The .....	629	Dulieu v. White .....	241, 253, 2-4
Diamond v. Minter .....	312	Duncan Fox & Co. v. N. & S.	
Dibbins v. Dibbins .....	474	Wales Bank .....	517, 529
Dickinson v. Dodds .....	83, 84	Dunlop v. De Murrietta .....	458
— v. Grand Junction Canal ..	351	— v. Higgins .....	36-7
Dickson v. G. N. Ry. ....	596, 606, 607	— v. Lambert .....	602, 603
— v. Reuter .....	248	Dunlop Tyre Co. v. New Garage,	
Diggle v. Higgs .....	183, 184	etc., Co. ....	213
Dimes v. Petley .....	336	— v. Selfridges .....	43, 99, 1-3
Dimmock v. Hallett .....	105	Dunster v. Hollis .....	3-4
Dingle v. Hare .....	455, 469, 471	Durham v. Robertson .....	196-8
Dirks v. Richards .....	700	Durham (Mayor) v. Fowler ....	551
Ditcham v. Worrall .....	135-6	Durrell v. Evans .....	169
Ditchburn v. Goldsmith .....	178-9	Dutton v. Marsh .....	712
Dixon v. Bell .....	389	Dwyer v. Mansfield .....	337
— v. Hurrell .....	492	Dyer v. Munday .....	250, 293, 298
— v. Yates .....	653	Dyson v. Mason .....	178
Dobell v. Barber .....	241		
— v. Stevens .....	107		
Dobson v. Collis .....	55		
— v. Graves .....	779		
— v. Horsley .....	388		
Dodd v. Holme .....	350		
Doe v. Baytup .....	317		
— v. Bridges .....	256		
— v. Edwards .....	317		
— v. Goodwin .....	475		
— v. Robinson .....	458		
— v. Tamere .....	119		
Doherty v. Allman .....	245		
Dollman v. Ossett .....	778		
Dominion Gas Co. v. Collins ....	286		
Donald v. Suckling ....	325, 699, 700, 791, 793		
Donellan v. Read .....	56-7		

## E.

E. W. A., Re .....	207
Eager v. Grimwood .....	100
Eaglesfield v. Londonderry .....	105
Earle v. Oliver .....	45
Easson v. L. & N. W. Ry. ....	563
East Suffolk Rivers Catchment	
Board v. Kent .....	270
East and W. India Docks v. Kirk	501
Eastern Archipelago v. R. ....	96
Eastern Counties v. Russell .....	519
Eastern, etc., Telegraph Co. v.	
Cape Town Tramways .....	316
Eastland v. Burchell .....	491, 492

## TABLE OF CASES

xxi

	PAGE
Eastwood v. Kenyon .....	44-5, 545
Ebsworth and Tidy, <i>Re</i> .....	104
Eccles v. Bryant .....	40
Economic Gas Co. v. Usborne ..	86
Economic Life Assce. v. Usborne	86
Edelstein v. Schuler .....	5, 723
Edge v. Nicolls .....	424
— v. Strafford .....	58
Edgington v. Fitzmaurice .....	105-6
Edmondson v. Birch .....	446
Edmunds v. Bushell .....	470
— v. Wallingford .....	78
Edmundson v. Longton (Mayor) ..	216
Edwards v. Birmingham Naviga- tion Co. ....	350, 391
— v. Carter .....	138
— v. Levy .....	516
— v. Mallan .....	247
— v. Marcus .....	712
— v. Met. Water Board .....	278
— v. Porter .....	479
— v. Rees .....	94
— v. Trevellick .....	517
Edwick v. Hawkes .....	318
Egan v. Langham .....	157
Egbert v. National Bank .....	550
Elcock v. Thomson .....	562
Elder Dempster v. Paterson Zochonis .....	617, 627
Eldon (Lord) v. Hedley .....	653
Eldridge & Morris v. Taylor .....	158
Ever v. Positive Assce. Co. ..	99, 491
Ehas v. Pasmore .....	316
Ellerman Line v. Grayson .....	372
— v. Read .....	85
Ellsmere (Earl) v. Wallace ..	178, 184
Ellsmere Brewery v. Cooper	548, 550
Ellinger v. Mutual, etc., Co. of New York .....	553, 574
Elliot v. Albert .....	406
— v. Bax-Ironside .....	729, 743
Elliot Tug Co. v. Adm. Commrs.	614
Ellis, <i>Ex p.</i> .....	720
— v. Banyard .....	397
— v. Emanuel .....	552
— v. Hinds .....	576
— v. Lofus .....	393
— v. Sheffield Gas Co. ....	301
— v. Stanning .....	333
— v. Torrington .....	194
Ellor v. S. Ifridge .....	368
Elmore v. Kingscote .....	61
— v. Stone .....	584
Elsee v. Gutward .....	587
— v. Smith .....	412
Elson v. Crookes .....	571
Elton v. Broadbent .....	226
Elvin Powell v. Plummer Roddis	327

	PAGE
Elworthy v. Bird .....	779
Emanuel v. Symon .....	90
Embrey v. Owen .....	251, 351-2
Emery v. Wase .....	794
Emmens v. Pottle .....	427
Emmerson v. Heelis .....	452
Emmett v. Norton .....	492
Empress Engineering Co., <i>Re</i> ..	101, 474
Endymion, <i>The</i> .....	375
Engelhardt v. Farrant .....	296
English v. Met. Water Board ..	355
English Hop Growers v. Dering	174, 244
Enoch, <i>Re</i> .....	801, 802, 812
Erlanger v. New Sombrero Co.	103, 110
Erskine v. Adeane .....	380
— v. Sachs .....	460
Ertel Bieber v. Rio Tinto .....	146
Eshelby v. Fed. European Bank .	223
Esposito v. Bowden .....	165, 210
Eustace, <i>Re</i> .....	110
Evans v. Bembridge .....	550
— v. Bignold .....	572
— v. Employers' Assoc. ....	473
— v. Heathcote .....	45, 77, 160, 173-4, 176
— v. Hoare .....	62
— v. Philpotts .....	496
— v. Roberts .....	58
— v. Walton .....	407
Evanson v. Crooks .....	573
Everett v. Griffith .....	366
Exall v. Partridge .....	78
Excelsior Rope Co. v. Callan ...	365
Eyles v. Ellis .....	214
Eyre v. Johnson .....	210

## F.

Fagan v. Green .....	595, 600
Fairlie v. Fenton .....	488, 481, 482
Fairman v. Oakford .....	514
— v. Perpetual, etc., Soc. ..	382, 383-6, 383
Falck v. Williams .....	117
Fama'sina Corporation, <i>Re</i> .....	466
Fardon v. Harcourt Rivington ..	394
Farebrother v. Simmons .....	63, 129
Farina v. Fickus .....	27
Farmer v. Russell .....	191, 456
Farmers' Mart v. Milne ....	160, 1-3
Farnworth v. Packwood .....	591
Farquharson v. King ...	241, 477, 657
Farr v. Butters .....	364
— v. Messers .....	63, 640
— v. Motor Traders' Soc. ....	555

	PAGE		PAGE
Farrant v. Barnes .....	588, 599	Fleet v. Murton .....	481, 483
Farrer v. Nelson .....	348	Fleming v. Bank of N. Zealand	
Farrow v. Wilson .....	192, 209, 487	42-3, 238, 475, 767	
Farrow's Bank, Re .....	746	— v. Hislop .....	312, 344
Fasey, Re .....	78	Fletcher v. Jubbs .....	495
Fawcett v. Cash .....	515	— v. Marshall .....	51, 80
— v. Smethurst .....	263, 678	— v. Smith .....	318
Fay v. Prentice .....	318, 341	Flight v. Bolland .....	133
Felix Hadley Co. v. Hadley ....	216-7	— v. Booth .....	104
Fell v. Brown .....	150	Florence, The .....	568
— v. Knight .....	589	Flower v. Adam .....	371
Felthouse v. Bindley .....	84	— v. Ebbw Vale .....	530
Fender v. Mildmay .....	167	— v. Lloyd .....	85
Fenna v. Clare .....	839	— v. Sadler .....	116, 167
Fenton v. Thorley .....	538	Flureau v. Thornhill .....	237
Fenwick, Re .....	479	Flynn v. Robertson .....	808
Feret v. Hill .....	190	Foakes v. Beer .....	47, 214-5
Ferns v. Carr .....	51	Foley v. Classique Coaches, Ltd.	
Fesenmayer v. Adcock .....	723	22, 91	
Fewings, Ex p. ....	86	— v. Hill .....	766
Fibrosa Spolka Akcyjna v. Fair-		Folkes v. King .....	661
bairn .....	79, 80, 208	Foord v. Morley .....	463
Field v. Adames .....	319	Forbes v. Git .....	91
Fielding v. Corry .....	756	— v. Jackson .....	517
Filburn v. People's Palace ....	393-4	Ford, Ex p. ....	73
Filby v. Hounsell .....	40, 60	— v. Beech .....	93, 203
Fillieul v. Armstrong .....	516	— v. Foster .....	423
Filliter v. Phippard .....	391	— v. Newth .....	39
Finch v. Boning .....	219	Forde v. Skinner .....	306
— v. Brook .....	220	Fords v. Bartlett .....	791
— v. G. W. Ry. ....	359	Forget v. Ostigny .....	178, 182
Findon v. Parker .....	417	Forman v. Liddesdale .....	224, 475
Fine Art Society v. Union Bank	723	Formby v. Formby .....	483
Finlay v. Chirney .... 7, 233, 236,	238	Fort, Re .....	500
Finlay & Co. v. N. V. Kwik, etc.,		Forth v. Simpson .....	697
Maatschappij .....	235, 240, 666	Foscolo Mango v. Stag Line ....	95,
Finnegan v. Allen .....	785	627, 632	
First National, etc., Co. v.		Foster v. Bates .....	471
Greenfield .....	110	— v. Colby .....	625
Firth, Ex p. ....	710	— v. Dawber .....	203, 230
— v. Bowling .....	346	— v. Driscoll .....	165, 730, 735
Fisher v. Apollinaris Co. ....	167	— v. Hasling Corpn. ....	799
— v. Bridges .....	177	— v. McKinnon .....	121
— v. Drewitt .....	464	— v. Wheeler .....	20
— v. Prowse .....	388	Fouldes v. Willoughby .....	321, 328
— v. Ruislip-Northwood U.D.C.		Fowler, Re .....	6-3
259, 270		— v. Commercial Timber Co.	
— v. Smith .....	698	76, 487	
Fishmongers' Co. v. Robertson ..	149	— v. Fowler .....	126
Fitch v. Dewes .....	169, 171	— v. Mid. Elec. Corpn. ....	216
— v. Jones .....	185	France v. Gaudet .....	332
Fitzgerald v. Dressler .....	546	Francis v. Roose .....	434
— v. Northcote .....	275	Frankenberg and Security Co.,	
Fitzjohn v. Mackinder .....	412-3	Re .....	780
Fitzroy v. Cave .....	416	Franklin v. S. E. Ry. ....	249
Fiumana Soc. Navigazione v.		Franks, Ex p. ....	133
Bunge Co. ....	563	Fray v. Voules .....	451
Flag Lane Chapel v. Sunderland			
Corpn. ....	797		

	PAGE		PAGE
Freeman v. Pope .....	78	George, <i>Re</i> .....	768
— v. Rosher .....	300	— v. Claggett .....	485
French v. Gething .....	714	— v. Davies .....	515, 517
— v. Leeston S.S. Co. ....	465, 486	Gerahty v. Baines .....	465
— v. Styrling .....	501	Gerrard v. Crowe .....	272
French Government v. Tsurushima		Gibaud v. G. E. Ry. ....	32, 618
Maru S.S. Co. ....	796	Gibbons v. Westminster Bank ..	236, 767
Frenkel v. MacAndrews .....	627	Gibbs, <i>Re</i> .....	97
Freshwater v. Bulmer, etc. ....	87	— v. Cruikshank .....	324
Fricker v. Van Grutten .....	496	— v. Guild .....	490
Friend v. Young .....	218, 229	Gibby v. E. Grinstead Co. ..	529, 580
Frith v. Frith .....	524	Gibson v. Carruthers .....	195
Fritz v. Hobson .....	383	— v. Crick .....	463
Frost v. Aylesbury Dairy ..	649, 675	— v. Holland .....	64
— v. Knight .....	222, 235	Gieve, <i>Re</i> .....	182
Fry v. Lane .....	112	Gilbert v. Fletcher .....	181
— v. Merc. Bank of India		Gilding v. Eyre .....	414
.....	621, 625	Giles v. Walker .....	348
— v. Smellie .....	477	Gill v. Manchester Ry. ....	599, 600
Fuentes v. Montis .....	623	Gillman v. Robinson .....	477
Fulham v. McCarthy .....	197	Gimblett, <i>Ex p.</i> .....	72
Fullwood v. Hurley .....	458	Ginger, <i>Re</i> .....	714, 720
Furber v. Cobb .....	720	Gladwell v. Steggall .....	248
Furby v. Hoby .....	655	Glanville v. Sutton .....	394
Furnivall v. Hudson .....	453	Glasbrook, Ltd. v. Glamorgan	
		County Council .....	50
G.		Glasgow Corpn. v. Muir ....	361, 386
Gabriel v. Churchill .....	490	— v. Taylor ....	364, 377, 388, 390
Gadd v. Houghton .....	481	Glasspoole v. Young .....	326
— v. Thompson .....	131	Glazebrook v. Woodrow .....	206
Galam, Cargo ex .....	624	Glegg v. Bromley .....	200
Gallraith v. Block .....	663	Glenwood v. Phillips .....	332
Galland, <i>Re</i> .....	491	Glicksman v. Lancashire and	
Gallwey v. Marshall .....	435	General Assce. Co. ....	553
Gardiner v. Heading .....	481, 484	Glover v. L. and S. W. Ry. ..	285
Garland v. Jacob .....	505	Gluckstein v. Barnes .....	460
Garton v. Bristol & Exeter Ry.		Glyn v. Margetson .....	95-6
.....	596, 597	Goddard v. Jeffreys .....	123
Gas Float Whitton, The ....	568, 569	— v. O'Brien .....	214
Gaters v. Medley .....	141	Godefroy v. Dalton .....	495
Gates v. Bul .....	304	Godfrey v. Poole .....	73
Gaunt v. Fynney .....	342	Goffin v. Donnelly .....	439
Gausson v. Morton .....	466	Goh Choon Seng v. Lee Kim So ..	298
Gayford v. McElt .....	359	Gokal Chano-Jagan Nath v. Nand	
— v. Nichol .....	355	Ram Das Atna .....	455
Gaylor v. Davies .....	369, 393	Gold v. Essex County Council ..	301
Gelhardt v. Sanders .....	76	Goldfarb v. Bartlett .....	551
Geddes v. Barn Reservoir Pro-		Goldham v. Edwards .....	226
prietors .....	270	Goldrei v. Sinclair .....	265
Gedding v. Marsh .....	649	Goldstrom v. Tallerman .....	719
Gee, Walker v. Friary .....	592	Golodetz v. Schrier .....	782
Geilinger v. Gibbs .....	496	Gomersall, <i>Re</i> .....	724
General Accident Insee. v. Noel		Gooch, <i>Re</i> .....	85
Billposting Co. v.		Good v. Cheesman .....	215
Atkin-on .....	221	— v. Walker .....	724
General Medical Council v. Spack-		Gondall v. Skelton .....	640
man .....	786	Goode v. Harrison .....	502
		Goodlock v. Cousins .....	657



	PAGE		PAGE
Goodman v. Chase .....	545	G. W. Ry. v. Bagge .....	602
— v. Taylor .....	272	— v. Bunch .....	611, 612
Goodson v. Baker .....	178	— v. London and County Bank .....	773
— v. Richardson .....	292	— v. McCarthy .....	606
Goodtitle v. North .....	9	— v. Sutton .....	596
Goodwin v. Roberts .....	5, 728, 728	Greaves v. Legg .....	206
Goody v. Penny .....	81	Grébert Borgnis v. Nugent .....	239, 240
Gordon v. Goldstein .....	715	Green v. All-Motors, Ltd. ....	699
— v. Gordon .....	103	— v. Arcos .....	661
— v. Harper .....	321, 329	— v. Bartlett .....	465
— v. Potter .....	513	— v. Duckett .....	116
— v. Silber .....	594	— v. Kopke .....	481, 483
— v. Street .....	120	— v. Lucas .....	464
Goringe v. Irwell, etc., Works ..	198	— v. Marsh .....	708
Gorris v. Scott .....	257	— v. Thompson .....	130
Gosling v. Birnie .....	584	— v. Wetherill .....	88
Goss v. Nugent (Lord) .....	204	Greenberg v. Cooperstein .....	148
Gosse Millard v. Canadian, etc. Marine .....	632	Greenhill v. Federal Ins. Co. ..	560, 561
Gotliffe v. Edleston .....	260	Greenway v. Fisher .....	329
Gould v. Essex C. C. ....	513	Greenwood v. Martin's Bank ....	712
— v. S. E. & C. Ry. ....	454, 598	— v. Sutcliffe .....	220
Govier v. Hancock .....	492	Greer v. Downs Supply Co. ....	487, 487
Gowan, <i>Re</i> .....	231	— v. Kettle .....	550
Gowar v. Hales .....	164	Gregory v. Piper .....	293, 312
Goy, <i>Re</i> .....	197	Gregson, <i>Re</i> .....	801
Graham v. Oxlade .....	466	Grell v. Levy .....	186
— v. Peate .....	316	Greyvensteyn v. Hattlingh .....	350
— v. Seal .....	218	Grice v. Kenrick .....	480
Graigola, etc., v. Swansea Corp. ....	279	Griffin v. Union, etc., Bank ....	719
Grainger v. Gough .....	28	— v. Weatherby .....	731
— v. Hill .....	309	Griffiths v. Dalton .....	711
Grand Junction Canal Co. v. Shugar .....	355	— v. Fleming .....	558, 573
Grand Trunk Ry. of Canada v. Jennings .....	290	— v. Smith .....	275
Grange v. Silcock .....	296	— v. Teetgen .....	409
Grant v. Australian Knitting Mills .....	363, 647, 649	Griffiths Cycle Corporation v. Humber .....	67
— v. Gold, etc., Syndicate ..	81, 461	Grill v. General, etc., Collier Co.	366-7
— v. Norway .....	621, 634	Grindell v. Bass .....	67
— v. Secretary of State for India .....	439	Grinham v. Willey .....	319
— v. Sun Shipping .....	530	Grissell, <i>Re</i> .....	125
— v. Thompson .....	415	Groenvelt v. Burwell .....	52
— v. United Switchback Co. ....	474	Groves v. Lord Wimborne .....	256
Graveley v. Barnard .....	171	Grundy v. Sun Printg. Assoc. ....	515
Graves v. Weld .....	59	Guest v. Gaston .....	537
Gray, <i>Re</i> .....	494	Guild v. Conrad .....	544, 546
— v. Coles .....	494	Gunnear v. L.P.T.B. ....	379
— v. Milner .....	731	Gullischen v. Stewart .....	621
— v. Pullen .....	301	Gully v. Smith .....	310
G. C. Ry. v. Bates .....	382	Gundry v. Sainsbury .....	151
— v. Hewlett .....	260, 270	Gunn v. Bolclow & Co. ....	216, 700
G. E. Ry. v. Lord's Trustees ..	707	— v. Roberts .....	635
G. N. Ry. v. Behrens .....	603	Gurney v. Womersley .....	51
— v. L.E.P. Transport ...	596, 599	Guthing v. Lynn .....	22
— v. Swaffield .....	473	Gutsell v. Reeve .....	20, 62
— v. Witham .....	23, 38	Gutter v. Tait .....	558
		Guyot v. Thompson .....	320
		Guy-Pell v. Foster .....	225

	PAGE		PAGE
Gwatkin v. Campbell .....	459	Handcock v. Baker .....	311
Gwilliam v. Twist .....	293, 473	Hands v. Simpson, Fawcett & Co. ....	516
H.		Hankinson v. Bilby .....	434
Hackney v. Watts .....	663	Hannah v. Peel .....	331
Hadley v. Baxendale .....	238	Hansford v. Jago .....	358
Haggard v. Pelicier Frères .....	268	Hanson v. Meyer .....	625, 654
Haigh v. Brooks .....	47	Hansson v. Hamel .....	606
— v. Royal Mail, etc., Co. ..	289	Harburg Indiarubber Co. v. Martin .....	515, 516
Hale v. Hale .....	96	Harcastle v. N. Yorks Ry. ....	339
Hales v. Kerr .....	369	Hardie & Lane v. Chilton ..	261, 400
— v. L. & N. W. Ry. ....	599	Harding v. Harding .....	197
Halford v. Kymer .....	573	Hardy v. Cent. Lon. Ry. ..	383, 387-8
Halifax Bldg. Soc. v. Keighley ..	572	— v. Hillerns .....	667
Hall, <i>Re</i> .....	808	Hargrave v. Smee .....	96
— v. Brooklands .... 74, 273,	381	Hargreave v. Spink .....	658
— v. Fearnley .....	306	Hargroves, Aronson & Co. v. Hartopp .....	388
— v. Gurney .....	463	Harman v. Johnson .....	505
— v. Laver .....	497	Harmer v. Armstrong .....	101
— v. Norfolk (Duke) .....	336	— v. Cornelius .....	516
— v. Odber .....	89	Harnett v. Bond .....	266, 370
— v. Pinn .....	210	— v. Fisher .....	366
— v. Warren .....	143	Harper v. Charlesworth .....	316
— v. Whiteman .....	712	— v. Godsell .....	701
Hallen v. Runder .....	59	— v. Haden & Co. ....	336, 338
Hallet v. Mears .....	496	— v. Luffkin .....	408
Hallett's Estate, <i>Re</i> .....	218	— v. Vigers .....	482
Hallwell v. Venables .....	368	Harris v. Brisco .....	417
Halvey v. Lowenfeld .....	148	— v. Carter .....	49
Hamiro v. Burnard .....	472	— v. G. W. Ry. ....	613
Hambrook v. Stokes .....	283, 370	— v. James .....	345
Hambrough v. Mutual, etc., Insce. Co. of N. Y. ....	553	— v. Mobbs .....	286, 339
Hamer v. Giles .....	497	— v. Nickerson .....	27
— v. Knowles .....	357	— v. Quine .....	93
— v. Sharp .....	469	Harris's Case, Imperial Land Co. of Marseilles, <i>Re</i> .....	36-7
Hamilton v. Daw .....	362	Harrison v. Blackburn .....	317
— v. Long .....	403	— v. Huddersfield S.S. Co. ..	622
— v. Pan'orf .....	623	— v. Jago .....	359
— v. Vaughan-Sherrin Elec- tical Engineering Co. ....	135	— v. Knowles .....	644
— v. Watson .....	518, 549	— v. Rutland (Duke) .....	314-5
Hamlin v. G. N. Ry. ....	241	— v. Southwark and Vauxhall Water Co. ....	242
Hamlyn v. Crown Accidental Insce. Co. ....	576	Harrols, Ltd. v. Lemon .....	45-6
— v. Talsner Distillery Co. ..	90	— v. Stanton .....	715
— v. Wood .....	46-5	Harrol v. Watney .....	379
Hampden v. White .....	36-5	Harrop v. Fisher .....	718
Hammer v. Dyart (Earl) ..	9, 11, 252, 340-2	Harsant v. Blaine .....	81, 455, 456
Hammond v. Duxsey .....	239, 241	Harte v. Pearl Life Insce. ....	190, 558, 573, 574
— v. Holiday .....	465	Hart, <i>Re</i> .....	73
Hammonds v. Barclay .....	697	— v. Baxendale .....	603
Hampton v. Walsh .....	179, 183	— v. Prater .....	129
Hampton v. Glamorgan County Council .....	457	— v. Riversdale Mill ....	519, 522
Hanau v. Ehrlich .....	55-7	Hartley v. Harriman .....	394
		— v. Hymans .....	99

	PAGE		PAGE
Hartley v. Ponsonby .....	49	Henderson v. Williams .....	302
Hartop, <i>Ex p.</i> .....	496	Henry v. Goldney .....	26
Harvey v. Bridges .....	309	Hensworth v. Fowkes .....	114
— v. Facey .....	28	Henthorn v. Fraser .....	36-7
— v. Gibbons .....	47	Hepworth Co. v. Ryott .....	168
— v. Pocock .....	316	Herald v. Connah .....	737, 744
— v. Walker and Homfrays ..	210	Herbert v. Fox .....	336
Haseldine v. Daw .....	363, 386	Herbert's Trustee v. Higgins ..	719
— v. Winstanley .....	731	Herd v. Weardale Co. ....	311
Haslam v. Sherwood .....	47	Herman v. Jeuchner ....	160, 166, 189
Hasleham v. Young .....	505	Hermann v. Charlesworth ...	167, 188
Hasleton v. Jackson .....	184	Hermione, The .....	154
Hastelow v. Jackson .....	189	Herne Bay S.S. Co. v. Hutton ..	209
Hastings v. Pearson .....	660	Herring v. Boyle .....	310
— (Marquis) v. Thorley .....	220	— v. Met. Board of Works ..	338
Havana, etc., Factories v. Od-		Herschthal v. Stewart and Arden ..	363
denino .....	423	Heseltine v. Simmons ..	712, 714, 715
Hawkes, <i>Re</i> .....	497	Hetherington v. Groome .....	718
— v. Cottrell .....	494	Hough v. L. & N. W. Ry. ..	600, 601
Hawkins v. Price .....	61	Hewison v. Guthrie .....	698
Hawtayne v. Bourne .....	473	Hewitt v. Bonvin .....	299
Hawthorn v. Hammond .....	589	Hewlett v. Allen .....	321
Hay v. Carter .....	543	Heydon v. Smith .....	323
— v. Young .....	283, 361	Heyman v. Darwins ..	163, 222, 793
Haydon v. Brown .....	708	Heynes v. Dixon .....	242
Haygarth v. Wearing .....	104	Heywood v. Pickering .....	709
Haynes, <i>Re</i> .....	496	Hibbert v. McKiernan .....	330
— v. Harwood .....	273	Hibernian Bank v. Gysin ....	733, 770
Hayward v. Drury Lane Theatre		Hick v. Raymond .....	307, 618
— .....	381-2, 385, 527	Hickman v. Haynes .....	293
— v. Hagne .....	218	— v. Kent, etc., Breeders' Assn. ..	733
Heale v. Arabin .....	492	— v. Maisey .....	314-5
Heap v. Hartley .....	320	Hicks v. Faulkner .....	119
— v. Motorists' Agency ..	657, 661	— v. Richardson .....	573
Heard v. Pilley .....	452	Higgins v. Betts .....	357
Hearn v. L. & S. W. Ry. ....	603	— v. Northampton Corpn. ....	126
Heath v. Parkinson .....	455	— v. Scott .....	227
— v. Sansom .....	507	— v. Senior .....	452, 452
Heath's Garage v. Hodges .....	327	Hilbery v. Hatton .....	300, 326, 475
Heathorn v. Darling .....	634	Hill v. Featherstonhaugh .....	465
Heaven v. Pender .....	389	— v. Fox .....	178
Hebb's Case .....	35	— v. Hill .....	63, 179, 185
Hebbon v. West .....	574	— v. Manchester, etc., Water-	
Heddon v. Evans .....	269	works .....	72
Hedges v. Tagg .....	406	— v. Tupper .....	315, 320
Hedley v. Bainbridge .....	505	Hillas & Co. v. Arcos .....	91
Heffield v. Meadows .....	552	Hillen v. I.C.I. (Alkali), Ltd. ..	363, 366
Heibut v. Buckleton ....	51, 643, 644	Hills v. Sugrue .....	208
Heinrich Bjorn, The .....	634	Hillyer v. St. Bartholomew's	
Helby v. Matthews .....	681	Hospital .....	301
Hellwig v. Mitchell .....	434	Hilton v. Eckersley .....	173, 175
Helps v. Clayton .....	130, 453	Hindley v. Westmeath (Marquis) ..	168
Helsham v. Blackwood .....	436	Hiort v. L. & N. W. Ry. ....	326, 332
Hemmings v. Stoke Poges Club ..	318	Hippesley v. Knee .....	461
Henderson v. Arthur .....	217	Hirachand Punamchand v. Temple	
— v. Comptoir d'Escompte de		— .....	214-5
Paris .....	623	Hirschfield v. L. B. & S. C. Ry. ..	105
— v. Preston .....	269	Hirst v. West Riding Bank ....	422
		Hislop v. Hislop .....	714

## TABLE OF CASES

xxvii

	PAGE		PAGE
Hitchcock v. Coker .....	171	Horniman v. Smith .....	412-3
Hivac v. Park Royal .....	524	Horse Estate v. Steiger .....	193
Hoadley v. McLaine .....	61	Horsfall v. Thomas .....	108, 106
Hoare v. McAlpine .....	347	Horsfield v. Brown .....	312
— v. Niblett .....	493	Horton v. London Graving Dock..	386
— v. Rennie .....	225	Horton's Estate v. Beattie .....	358
Hobbs v. L. & S. W. Ry. ....	241	Horwood v. Millar .....	176
— v. Tinsling .....	433, 437	— v. Smith .....	659
— v. Wayet .....	547	Hosking v. De Havilland .....	544
Hobson v. Thelluson .....	366	Hough v. London Express ..	430-1, 433
Hoby v. Roebuck .....	57	Houghton v. Nothard .....	478
Hochster v. De la Tour .....	223	Houlden v. Smith .....	269, 311
Hodgkinson v. Ennor .....	352	Household Fire Insurance Co. v.	
— v. Fletcher .....	492	Grant .....	36
— v. Kelly .....	454	Hovenden v. Millhoff .....	461
Hodgson, Re .....	25, 506, 507	Hovil v. Pack .....	476
— v. Ford .....	593	Howard v. Harris .....	584
Hodkinson v. L. & N. W. Ry. ..	612	— v. Manx Isles S.S. Co. ....	464
Hodson v. Pare .....	140	— v. Odhams Press .....	166, 241
Holden v. Thompson .....	418	— v. Patent Ivory Co. ....	474
Holderness v. Collinson .....	698	— v. Refuge Friendly Society ..	558, 573, 574
Hole v. Sittingbourne Ry. ....	301	Howatson v. Webb .....	122
Holgate v. Bleazard .....	383	Howe v. Smith .....	640
Holl v. Griffin .....	584	Howell v. Coupland .....	642
Holland, Re .....	67, 73	Howson v. Hancock .....	184
— v. Bird .....	326	Hoyle, Re .....	63, 67
Holleran v. Bagnell .....	2-9	Hubbard, Ex p. ....	701, 707
Holliday v. Atkinson .....	746, 747	Hubbuck v. Wilkinson .....	449
— v. Nat. Telephone Co. ....	302, 365	Hucklesby v. Hook .....	62
Hollins v. Fowler .....	327, 329	Huddersfield Bank v. Lister ...	124
Hollywood Silver Fox Farm v.		Hudson v. Bray .....	340
Emmett .....	254, 343	— v. Roberts .....	391
Holme v. Brunsell .....	550	Hudston v. Midland Ry. ....	613
Holmes v. Blogg .....	131	Huffer v. Allen .....	414
— v. Goring .....	359	Huggett v. Miers .....	388
— v. N. E. Ry. ....	527	Hughes v. Little .....	718
Holt v. Ely .....	80	— v. Liverpool Soc. ....	190
— v. Heatherfield Trust .....	197	— v. Percival .....	350
— v. Markham .....	125	— v. Pump House Hotel ....	195-6
Honeywill & Stein v. Larkin ...	364	Hughes Hallett v. Indian, etc.,	
Hong Kong, etc. Bank v. Lo		Co. ....	547
Lee Shi .....	764	Hulland v. Sanders .....	519
Hood, Re .....	705	Hulley v. Silversprings, etc., Co.	353
— v. Anchor Line .....	30, 31	Hulton v. Jones .....	428-9, 431
Hooper v. Gumm .....	655	Humble v. Hunter .....	483
— v. L. & N. W. Ry. ....	600	Humphery v. Conybeare .....	61
Hop & Malt Co., Re .....	111	— v. Wilson .....	183
Hope v. Evered .....	414	Humphreys, Re .....	498
Hopkins v. Logan .....	41	Humphries v. Brogden .....	355
— v. Prescott .....	165, 157	— v. Cousins .....	254, 346
Hopkinson v. Lee .....	25	Hunt v. De Biquiere .....	492
Hopley v. Dufresne .....	755	— v. G. N. Ry. ....	444
Hopwood v. Muirson .....	433	— v. Porter .....	678
Horlock v. Beal .....	208-10	— v. "Star" Newspaper ....	437-8
Horn v. Anglo-Australian In-		Hunter v. Johnson .....	306
surance Co. ....	571	— v. Parker .....	475
Hornby v. Lacy .....	489	— v. Walters .....	122
Horne v. Milland Ry. ....	240	Huntington v. Attrill .....	89
Horner v. Walker .....	62		

	PAGE		PAGE
Huntley (Marchioness) v. Gaskell	87	Jackson v. Watson	287, 406, 649, 675
Huntoon v. Kolynos	206	Jacobs v. Batavia Trust	50
Hurdman v. N. E. Ry.	347	— v. Crédit Lyonnais	92
Hurst v. Picture Theatres	320-1	— v. L. C. C.	386
Hussey v. Horne Payne	40	— v. Morris	473
Hutcheson v. Eaton	481	— v. Seward	317-8
Hutchins v. L. C. C.	294, 297-8	Jager v. Tolme	801
Hutchinson v. Bowker	38	Jakeman v. Cook	45
Huth v. Huth	426	James, <i>Ex p.</i>	125
— v. Lamport	625, 700	— v. Attwood	788
Hutley v. Hutley	418	— v. Boston	444
Hutton v. Byre	207	— v. British Gen. Insce.	167
Hyams v. Stuart-King	179, 180	— v. Campbell	307
Hyde v. Wrench	36	— v. Isaacs	214
Hydraulic Engineering Co. v. McHaffie	241	— v. James	7-8
Hyman v. Hyman	168	— v. Smith	461
— v. Nye	588	Jameson v. Kimmell Bay	57
Hymas v. Ogden	325	Janvier v. Sweeney	253
		Jarrett v. Hunter	60
		Jarvis v. Moy & Co.	217
		Jay, <i>Ex p.</i>	717
		Jay's v. Brand	683
		Jay's, Ltd. v. Jacobi	424
		Jebara v. Ottoman Bank	173
		Jefferies v. G. W. Ry.	321, 332
		Jefferson v. Derbyshire Farmers	295, 365
		Jeffery, <i>Re</i>	26
		Jeffrey v. Bamford	182
		Jeffreys v. Evans	152
		Jelks v. Hayward	330
		Jenkins v. Coomber	761
		— v. Jackson	315
		— v. Morris	144
		Jenks v. Turpin	179
		Jenkyns v. Southampton S.S. Co.	600
		Jenner v. Turner	167
		Jennings v. Hammond	147
		— v. Rundall	263-4
		Jetley v. Hill	491
		Jewry v. Busk	463
		Joachimson v. Swiss Bank Corporation	216
		Jobson v. Palmer	153
		John v. Dodwell	173
		Johnson v. Clark	138
		— v. Diprose	321, 771
		— v. Dodgson	62
		— v. Gallagher	139
		— v. Hill	594
		— v. Kearley	43, 463, 467
		— v. Latham	549
		— v. Midland Ry.	596, 597
		— v. Pye	156
		— v. Rees	709
		— v. Royal Mail S.S. Co.	77
		— v. Taylor	666
		— v. Sumner	492
		Johnston v. Boyes	28

## I.

Illidge v. Goodwin	389
Imperial Credit Co. v. Coleman	459, 460
Imperial Loan Co. v. Stone	143
Importers' Co. v. Westminster Bank	773
Inche Noriah v. Shaik Allie Bin Omar	114
Indermaur v. Dames	385-6
Inglis v. Stock	558, 666
Ingram v. Lawson	430
Inman v. Stamp	58
Innes v. Wylie	306
Inverkip S.S. Co. v. Bunge	619
Ionides v. Pacific Insce. Co.	560
Iossifoglu v. Coumantaros	800
Ireland v. Livingston	454
Irvine v. Watson	484
Irwin v. Waterloo Taxi-cab Co.	295
Isaacs v. Cook	439
— v. Hardy	638
— v. Royal Insurance Co.	98
— v. Salbstein	26, 87
Isaacson, <i>Re</i>	717
Isis S.S. Co. v. Bahr	618
Ives v. Willans	791

## J.

Jackson v. Adams	434
— v. Barry Ry.	781, 795
— v. Cobbin	49
— v. Hudson	737
— v. Napper	453
— v. Union Marine Insce. Co.	617

## TABLE OF CASES

xxix

	PAGE
Johnston v. G. W. Ry. ....	283
— v. Orr-Ewing .....	424
Johnstone v. Marks .....	129
— v. Milling .....	223
— v. Pedlar .....	145, 267-8
Jolly v. Rees .....	496
Jones, <i>Ex p.</i> , re Grissell (1879) ..	138
—, <i>Ex p.</i> , re Jones (1881) ....	131
—, <i>Re</i> (1896) .....	152
—, <i>Re</i> (1905) .....	498
— v. Arthur .....	219, 220
— v. Boyce .....	375
— v. Chapman .....	316
— v. Chappell .....	344
— v. Coventry .....	723
— v. Daniel .....	38
— v. Dowle .....	325
— v. Festiniog Ry. ....	346
— v. Flint .....	58
— v. Gardiner .....	237
— v. Gibbons .....	223
— v. Gordon .....	724
— v. Herbert .....	206
— v. Hulton .....	428
— v. Humphreys .....	196
— v. Jackson .....	592
— v. Jones (1916) .....	425, 433-5
— v. Joyner .....	66
— v. Liverpool Corp. ....	308
— v. Llanrwst U. D. C. ....	317, 345-6, 352
— r. Marshall .....	701
— r. Merioneths. Bldg. Soc. ..	167
— r. Owen .....	393
— r. Phipps .....	470
— r. St. John's College .....	208
— r. Scullard .....	303
— r. Tyler .....	591
— v. Waring & Gillow ....	125, 747
— v. Williams .....	336-7
Jonesco v. Beard .....	85
Jordan v. Norton .....	83
Jordeson v. Sutton Gas Co. ..	355, 357
Jordin v. Crump .....	384
Josephus v. Pebrer .....	177, 462
Joynt v. Cycle Trade Publishing Co. ....	437
Junior Carlton Club, <i>Re</i> .....	515
Jureidini v. National Ins. Co. ..	165

## K.

	PAGE
Kearsley v. Cole .....	580
Keates v. Lewis Merthyr Col- lieries .....	523
Keay v. Fenwick .....	457
Keable v. Hickeringill .....	348
Keen v. Mear .....	60, 469, 471
— v. Price .....	182
Keighley, Maxsted & Co. v. Durant .....	474
Keir v. Leeman .....	167, 779
Kekewich v. Manning .....	197
Kelly v. Croft .....	465
— v. Solari .....	124
Kelner v. Baxter .....	474, 479
Kemble v. Addison .....	711
Kemp v. Baerselman .....	200
— v. Falk .....	671
— v. Finden .....	78
— v. Ismay .....	670
— v. Neville .....	82, 85
— v. Rose .....	795
Kempler v. Bravingtons .....	655
Kendall v. Hamilton ....	26, 484, 506
— v. Marshall .....	670
Kennedy v. Broun .....	43, 150-1
— v. Panama Mail Co. ....	108
— v. Thomassen .....	31, 51
Kenyon v. Darwen Cotton Co. ....	161, 521
Keppel v. Wheeler ....	157, 165, 486
Kerford v. Mondel .....	700
Kerrison v. Smith .....	320
Kibble, <i>Ex p.</i> .....	85
Kilburn v. Kilburn .....	808
Kimber v. Gas Light Co. ....	387
— v. Press Association .....	410-1
Kimberley v. Dick .....	795
Kinch v. Wallcott .....	87
Kine v. Jolly .....	357
King v. Allen .....	320
— v. Paraday .....	176
— v. Hoare .....	26
— v. London Cab Co. ....	304
Kingston v. Preston .....	205
Kirchner v. Gruban .....	792
Kiril Mischeff v. Smith .....	808
Kirk v. Eustace .....	192
— v. Gregory .....	322, 332
Kirkby v. Taylor .....	513
Kirkham v. Attenborough ..	654, 659
— v. Marter .....	51
Kish v. Taylor .....	618, 627, 628
Kitchen v. Turnbull .....	793
Knight v. Crockford .....	62
— v. Gordon .....	464
Knott v. L. C. C. ....	392, 395
Knowlman v. Bluett .....	67
Knox v. Bushell .....	493



	PAGE		PAGE
Levett v. Gas Light Co. ....	358	London Bag, etc., Co. v. Dixon ..	784
Levey v. Goldberg .....	208	London and Blackwall Ry. v. Cross .....	292
Levy v. Goldhill .....	487, 451, 465	London, B. & S. C. Ry. v. Truman .....	371
— v. Scottish, etc., Ins. Co. ..	556	London, City and Midland Bank v. Gordon .....	778
Lewis v. Clay .....	122	London Corpn. v. Riggs .....	359
— v. Denye .....	371	London C. C. v. Att.-Gen. ....	148
— v. Levy .....	440	London Discount Co. v. Creasy ..	716
— v. Meredith .....	354	London Dock Co., Re .....	802
— v. Read .....	300	London Freehold Co. v. Suffield ..	69
— v. Thomas .....	715	London G. O. Co. v. Holloway ..	548
Leyland v. Norwich Union .....	242	— v. Lavell .....	803
Liddle v. Yorks. (N. R.) C. C. ..	388	London and Globe Corpn., Re ..	698
Liesbosch Dredger v. S.S. Edison	282	London Jewellers v. Attenborough	654
Liggett v. Barclays Bank .....	767	London Joint Stock Bank v. Macmillan .....	700, 766, 767, 768
Liles v. Terry .....	495	— v. Simmons .....	722
Lilley v. Barnsley .....	700	London (Lord Mayor of) v. Cox ..	269
— v. Doubleday .....	454, 584, 585	London & N. E. Ry. v. Brentnall	535
— v. Rankin .....	185	London and Northern Bank, Re .	36
— v. Roney .....	439	London & N. W. Ry. v. Ashton ..	604
Linland v. Stephens .....	517	— v. Billington .....	784
Limpus v. L. G. O. Co. ....	298	— v. Glyn .....	558
Lindenau v. Desborough .....	553	— v. Hudson ....	597, 598, 601, 602
Lindsay v. Queen's Hotel .....	518	— v. Jones .....	784
Linford v. Pockett .....	712, 718	— v. McMichael .....	134
— v. Provincial Ins. Co. ....	469	— v. Neilson .....	599, 626
Lingood v. Eade .....	803	London Plywood v. Nasic Oak ..	667
Lister v. Lanes & Yorks Ry. ....	598	London Trade Assocn. v. Greenlands .....	443
— v. Stubbs .....	460	Long v. Millar .....	65-6
Liston v. S.S. Carpathian ....	30, 571	Longridge v. Dorville .....	47, 50
Litchfield-Speer v. Queen Anne's Gate Syndicate .....	357	Looker v. Law Union, etc., Insce. Co. ....	557
Liver Alkali Co. v. Johnson .	598, 626	Lord v. Hall .....	457
Llandrindod Wells Water Co. v. Hawksley .....	813	— v. Kellett .....	494
Llewellyn, Re .....	497	Lord Strathcona S.S. Co. v. Dominion Coal Co. ....	209, 245
Lloyd v. Grace, Smith & Co. ....	398, 468, 472	Lott v. Outhwaite .....	464
— v. Guilbert .....	93	Lough v. Ward .....	406
— v. Harper .....	552	Louth v. Drummond .....	516
— v. Nowell .....	39-40	Love & Stewart v. Rowton S.S. Co. ....	615
Lloyds Bank v. Chartered Bank of India .....	767, 773	Lovegrove, Re .....	706
— v. Cooke .....	740	Lovell v. Beauchamp .....	185
— v. Savory .....	774	Lovell and Christmas v. Beauchamp .....	7502
Lobitos v. Admiralty Comms. ....	784	Lovesy v. Palmer .....	59-60
Lochgelly Iron Co. v. McMillan	366, 369	Lowe v. Peers .....	167
Lock v. Ashton .....	310	— v. Walter .....	515
— v. Iell .....	243	Lowry v. Walker .....	385
Locker & Woolf v. W. Australian Insce. Co. ....	104	Lows v. Telford .....	316
Lockwood v. Abdy .....	458	Lowther v. Harris .....	660, 661
— v. Cooper .....	175	Lucan (Earl), Re .....	198
— v. Levick .....	464	Lucas v. Dixon .....	67
Lodge v. Nat. Investment Co. ....	156	Lucena v. Crawford .....	558
London (H.M.S.) .....	241, 255	Lucy v. Bawden .....	388
London Assce. Co. v. Mansel ....	104, 553		



	PAGE		PAGE
Lumley v. Gye .....	398, 407	McManus v. Fortescue .....	676
— v. Ravenscroft .....	135	McNab v. Robertson .....	354
— v. Simmons .....	718	Macnaghten v. Douglas .....	153
— v. Wagner .....	245, 524	McPherson v. Daniels .....	428
Lumsden v. Buchanan .....	509	Macpherson v. Watt .....	103, 459
Lupton v. White .....	456	McQuire v. Western Morning News .....	438
Luxor v. Cooper .....	74, 466	Macrow v. G. W. Ry. ....	613
Lyde v. Barnard .....	421	Madden v. Kempster .....	699
Lyell v. Kennedy .....	474	Madel v. Thomas .....	679
Lyle, Ltd. v. Chappell .....	158	Magnhild S.S. v. McIntyre .....	95
Lynch v. Nurdin .....	369, 377, 389	Maguire v. Liverpool Corpn. ....	258
Lyon v. Fishmongers' Co. ....	335	Mahmoud and Ispahani. <i>Re</i> 162, 176, 186	
— v. Knowles .....	501	Maillard v. Argyle (Duke) .....	216
Lyons v. Gulliver .....	338	Mainwaring v. Giles .....	315
— v. Hoffnung .....	670	Malfroot v. Noxal .....	363
Lyus v. Stepney Borough Council	259	Mallan v. May .....	96
M.			
MacAndrew v. Chapple .....	617	Mallet v. G. E. Ry. ....	599
Macauley v. Polley .....	494	Mallett v. Bateman .....	51, 544
Macaura v. Northern Insce. Co. .	538	Malmesbury Ry. v. Budd .....	795
McCarthy v. Decaix .....	123	Malone v. Laskey .....	345
— v. Daily Mirror .....	526	Manbre Saccharine Co. v. Corn Products .....	666
McCartney v. Londonderry, etc., Ry. ....	352	Manby v. Scott .....	490, 492
McClelland v. Manchester Corpn.	259	Manchester Corpn. v. Farnworth — v. Williams .....	271 260
McCowan v. Baine .....	96	Manchester Liners v. Rea .....	618
McCullum v. Hicks .....	466	Manchester, Sheffield Ry. v. Brown .....	606
Macdonald v. Whitfield .....	729, 761	Manchester Ship Canal v. Man- chester Racecourse Co. ....	245
McDonald v. Nash .....	729, 740, 761	Manchester Trust v. Furness .....	622
MacDougall v. Knight .....	89	Manley v. Field .....	408
Macedo v. Stroud .....	69	Mann v. Forrester .....	693
McEntire v. Crossley .....	709	— v. Nunn .....	57
McEvoy v. Belfast Banking Co.	100	Mansell v. Clements .....	465
McFadden v. Blue Star Line ....	627	Manton v. Brocklebank ....	293-4, 396
McGregor v. Lowe .....	191	Manubenes v. Leon .....	518
— v. McGregor .....	57, 134	Manzoni v. Douglas .....	368
Machado v. Fontes .....	279	Maple Flock Co. v. Universal Furniture Products .....	661
MacHattie, <i>Ex p.</i> .....	711	Marchant v. Morton .....	502
Macintosh v. Dun .....	443-4	Mare v. Charles .....	737, 741
M'Kean v. M'Ivor .....	600	Marginson v. Blackburn Borough Council .....	83
McKenzie v. Coulson .....	126	Margrett, <i>Ex p.</i> .....	132
— v. Harding .....	409	Marine Insurance v. Grimmer ..	562
Mackenzie Kennedy v. Air Council	89	Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd. ....	210
McKeown v. Boudard .....	101	Marks v. Frogley, Ltd. ....	263
Mackersey v. Ramsays, Bonars & Co. ....	458	— v. Hannilton .....	558
McKinnell v. Robinson .....	176, 181	Marlow v. Pitfield .....	132
McKinnon v. Penson .....	258	Marquaco v. Banner .....	622
McLatchie v. Haslam .....	115	Marreco v. Richardson .....	217
McLaughlin v. Pryor .....	301	Marriott v. Hampton .....	124
McLean v. Bell .....	372-3	Marrison v. Bell .....	517
— v. Dunn .....	475	Marryatts v. White .....	217
— v. Fleming .....	618, 625	Marsden v. Meadows .....	704
Macleay v. Tait .....	106		
Macleod v. Snee .....	731		
Maclean v. Segar .....	381		
McLeod v. Power .....	506		

	PAGE		PAGE
Marsh v. Joseph .....	476	Mercantile Union, etc. v. Ball ..	181
- - v. Moores .....	576	Mercantile Union v. Bell .....	678
- - v. Police Comm. ....	594	Mercer, <i>Ex p.</i> .....	73
Marshall v. Broadhurst .....	194	- - v. Graves .....	497
- - v. English Electric .....	523	- - v. Wright .....	483
- - v. Glanville .....	465, 486	Merest v. Harvey .....	281
- - v. Green .....	59	Merivale v. Carson .....	437-8
- - v. York, etc., Ry. ....	247, 601	Merryweather v. Moore .....	523
Marten v. Whale .....	660	- - v. Nixan .....	265
Martin v. Crompe .....	25	Mersey Docks v. Coggins .....	303
- - v. Gale .....	181-2	- - v. Procter .....	870, 882, 885-6
- - v. L. C. C. ....	586	Mersey Steel Co. v. Naylor .....	225
- - v. Perry .....	464	Metal Constituents, <i>Re</i> .....	107
- - v. Shoppee .....	306	Metropolitan Asylums v. Hill ..	271, 337
- - v. Stanborough .....	360	- - v. Kingham .....	474
- - v. Tucker .....	461	Metropolitan Bank v. Pooley ..	411, 414
Martingell, <i>Ex p.</i> .....	185	Metropolitan Electric (o. r.	
Marwick v. Hardingham ....	451, 487	Ginder .....	245
Marzetti v. Williams .... 14,	238, 767	Metropolitan Ry. v. Jackson ....	367,
Maskell v. Hill .....	184	369-70	
- - v. Horner .....	115	Metropolitan Tunnel v. London	
Mason v. Barker .....	311	Electric Ry. ....	792
- - v. Clifton .....	458, 464	Metropolitan Water Board v. Dick.	
- - v. Farnell .....	331	Kerr & Co. ....	208, 210
- - v. Lack .....	731	Metzner v. Bolton .....	515
- - v. Provident Supply Co. ..	168,	Meux v. G. E. Ry. ....	248, 601
171		Meyer v. Decroix .....	733
Massey v. Banner .....	456	Meyrick's Settlement, <i>Re</i> .....	168
- - v. Sladen .....	96	Midland Bank v. Reckitt ....	472, 774
Matthew v. Olterton .....	795	Midland Insee. Co. v. Smith ....	249
Matthewman's Case .....	139	Midland Motor Showrooms v.	
Matthews v. Baxter .....	143	Newman .....	48, 551
Matthey v. Curling .....	210	Mighell v. Sultan of Johore ....	263
Maunder v. Conyers .....	451	Miles, <i>Ex p.</i> .....	670
Mavor v. Pyne .....	221	- - v. Hutchings .....	322, 384
May, <i>Re</i> .....	57	- - v. New Zealand Estate Co. ....	50
- - v. Burdett .....	391	Millen v. Brasch .....	603
- - v. Chapman .....	747	Miller v. Beale .....	463
Mayfair Property Co. v. Johnston	317	- - v. Cannon Hill Estates ....	361
Maynard v. Eaton .....	103	- - v. Hancock .....	388
Meacock v. Bryant .....	557, 572	- - v. Race .....	723
Mears v. L. & S. W. Ry. ....	321, 330	- - v. Radford .....	464
Measures Bros. v. Measures ....	462	- - v. Seare .....	208
Mecca, The .....	218	Miller, Gibb & Co. v. Tyrer ..	454, 480,
Mechanical, etc., Co. v. Austin ..	46	183	
Meckeln v. Wallace .....	57	Miller-lup v. Brookes .....	69
Medawar v. Grand Hotel .. 590,	591, 592	Millett v. Van Heck .....	673
Mediana (Owners) v. Comer		Mills v. Armstrong .....	376
(Owners) .....	237	- - v. Bayley .....	785
Mediterranean Export v. Fortresses		- - v. Brooker .....	337
Fabrics .....	802	- - v. Charlesworth .....	584
Mering v. Grahame-White Co. ....	303-10	- - v. Fowkes .....	218
Meguerditchian v. Lightbound ..	498	Mills Conduit, Ltd. v. Leslie ....	113
Mellor v. Leather .....	323	Milnes v. Dawson .....	746
Mellor's Trustees v. Maas .....	700	Miner v. Gilmour .....	352
Melville v. Stringer .....	718	Minifie v. Ry. Passengers' Assoc.	
Mennie v. Bake .....	6	Co. ....	793
Mentz v. Silvertown .....	299	Minter v. Priest .....	440
Menzies v. United Motor Finance	85	Mills Gray, Ltd. v. Cathcart (Earl)	491

	PAGE
Mitchell v. Crasweller .....	298
— v. King .....	220
Mitchell-Henry v. Norwich Union Society .....	216
Mitsui v. Watts .....	248, 616
Mogul S.S. Co. v. McGregor ..	160
252, 399-400	
Mollett v. Robinson .....	76, 488
Mollwo v. Court of Wards .....	501
Molynaux v. Hawtrey .....	104
Monarch S.S. Co. v. A/B Karls- hamns .....	617
Monetary Advance Co. v. Cater ..	712
Monk v. Warbey .....	256, 258
Monson v. Tussands .....	425
Montagu v. Forwood .....	185
Montague v. Benedict .. 490, 491	492
Montefiore v. Menday Co. .. 166	186
Montforts v. Marsden .....	494
Montgomerie v. U. K. Mutual S.S. Assoc. ....	480
Montgomery, <i>Re</i> .....	809
Montreal Gas Co. v. Vasey .....	27
Moody v. Cox .... 108, 114, 460,	495
Moon, <i>Re</i> .....	91
Moor Line v. Dreyfus .....	468
Moorcock, <i>The</i> .....	76
Moore v. Flanagan .....	484, 498
— v. Fulham Vestry .....	121
— v. Harris .....	614
— v. Lambeth Waterworks 260,	271
— v. Wilson .....	602
Moore and Landauer, <i>Re</i> .....	661
Moran v. Uzieli .....	558
More v. Weaver .....	410
Morel Bros. v. Westminster (Earl) .....	484, 491, 193
Morelli v. Fitch .....	650
Moreton v. Hardern .....	0
Morgan v. Ashcroft .....	124, 180
— v. Castlegate S.S. Co. ....	684
— v. Chetwynd .....	492
— v. Manser .....	203
— v. Morgan .....	795
— v. Ravey .....	71
— v. Scoulding .....	2-0
Morison v. Kemp .....	714
— London County and West- minster Bank . . . .	712, 773
— v. Thompson .....	161
Morley v. Attenborough .....	616, 702
— v. Loughnan .....	114-5
Morrell v. Frith .....	92
— v. Studd .....	34, 39
Morris v. Baron & Co. .. 66, 201,	226
— v. Luton Corp. ....	360
— v. Nugent .....	381
— v. Salberg .....	366
— v. Saxelby .....	168-171

	PAGE
Morrison, <i>Ex p.</i> .....	497
— <i>v.</i> Shaw, Savill .....	628
Morrison S.S. <i>v.</i> Greystoke .....	567
Morritt, <i>Re</i> .....	701, 714
— <i>v.</i> N. E. Ry. ....	603
Moss <i>v.</i> Anglo-Egyptian Navigation Co. ....	89
— <i>v.</i> Hancock .....	636
Motor Traders <i>v.</i> Midland Bank .....	775
Mouffet <i>v.</i> Cole .....	169
Moule <i>v.</i> Garrett .....	78
Moulis <i>v.</i> Owen .....	181, 185-6
Moult <i>v.</i> Halliday .....	515
Mourton <i>v.</i> Poulter .....	3-4
Mullens <i>v.</i> Miller .....	469
Mullet <i>v.</i> Challis .....	586
Mullner <i>v.</i> Florence .....	591, 608, (609)
Mumford <i>v.</i> Collier .....	709
— <i>v.</i> Oxford, etc., Ry .....	345
Munday <i>v.</i> Black .....	808
Munro <i>v.</i> Meyer .....	617, 655, (661)
— <i>v.</i> Wilmot .....	586
Munitt <i>v.</i> Royal Insee. Co. ....	169
Murphy <i>v.</i> Sullivan .....	57
Murray <i>v.</i> Currie .....	300
— <i>v.</i> Hall .....	317
— <i>v.</i> Mann .....	176
— <i>v.</i> Moutrie .....	375
Muschamp <i>v.</i> Lancaster and Preston lty. ....	(709)
Musgrove <i>v.</i> Pambelis .....	391
Muskett <i>v.</i> Hill .....	521
Mutual Finance <i>v.</i> Weston .....	115
Mutual Life Insee. Co. of New York <i>v.</i> Ontario Metal Co. ....	553
Myers <i>v.</i> Elliott .....	718
— <i>v.</i> Elman .....	436
— <i>v.</i> L. & S. W. Ry. ....	597
Myers & Co. <i>v.</i> Brent Cross Co. ....	613
Nyles <i>c.</i> Williams .....	191

4.

Nanka Bruce v. Commonwealth Trust	674, 636
Nash v. Armstrong	204
— v. Cuthbert	769
— v. De Foville	763
— v. Inman	128-130, 185
Nathan v. Ogden	729
Nat. Bank v. Silke	733
Nat. Bolivian Co. v. Wilson	471
Nat. Cash Register v. Stanley	678
Nat. Merc. Bank v. Rymill	324
Nat. Permanent Society, <i>Re</i>	192
Nat. Prov. Bank v. Glenside	519
— v. Lindsell	717
Nat. Sales Corp. v. Bernard	724

	PAGE		PAGE
Nat. (West Indies) Steamships ..	620	Norman v. G. W. Ry. ....	382
Nat. Telephone Co. v. Baker ....	346	North v. Loomes .....	63, 469
Naylor v. Mangles .....	698	— v. Wakefield .....	207
Neill v. Duke of Devonshire ....	96	— v. Wood .....	392
Nelson v. Cookson .....	279	North British Insce. v. London,	
— v. Couch .....	88	Liverpool & Globe Insce. ....	559
— v. Dahl .....	617, 618, 619	North Central Wagon Co. v.	
Nelson Line v. J. Neilson .....	626	Graham .....	679
Neter & Co. v. Licenses and Gen.		— v. Manchester, etc., Ry. ...	706
Ins. Co. ....	565	N. E. Ry. v. Hastings .....	94, 96
Neuwith v. Over Darwen Soc. ..	584	North-West Salt Co. v. Electro-	
Nevill v. Fine Arts Ins. Co. ....	480	lytic Alkali Co. ....	174
Neville v. "London Express" ..	415,	North Western Bank v. Poynter .	701
417-8		North & South Insce. Co. v.	
— v. Snelling .....	112	National Provincial Bank ....	732
New Chinese Co. v. Ocean S.S.		North and South Wales Bank v.	
Co. ....	621	Macbeth .....	793
New London Syndicate v. Neale .	729	Northcote v. Doughty .....	186
New Zealand Land Co. v. Watson	457	Northumberland Avenue Hotel	
New Zealand S.S. Co. v. Société,		Co., <i>Re</i> .....	474
etc., de France .....	205	Northwestern Utilities v. London	
Newbery v. Bristol Tramways ...	368	Guarantee Co. ....	347
Newbigging v. Adam .....	108	Norton v. Davison .....	640
Newen, <i>Re</i> .....	494, 495	Notara v. Henderson ....	599, 626, 634
Newington v. Levy .....	89, 203	Nottingham Building Society v.	
Newlove v. Shrewsbury .....	707	Thurstan .....	182
Newman, <i>Re</i> .....	456	Nottingham Corporation, <i>Re</i> ...	83
— v. Newman .....	575	Nowland v. Ablett .....	516
Newsholme v. Road Transport Co.		Nugent v. Smith .....	598, 626
469, 558, 556		Nunan v. Southern Ry. ....	289
Newstead v. "London Express" ..	429	Nuttall v. Bracewell .....	320
Newton v. Chorlton .....	530	Nyberg v. Handelaar .....	329, 554
— v. Hardy .....	401	Nye v. Moseley .....	165
— v. Harland .....	318		
Niblett v. Confectionists' Co. ...	646, 650		
Nichol v. Gods .....	616		
Nichols v. Ely Beet Sugar Fac-			
tory .....	14-15, 255, 305, 319		
Nichols v. Marland .....	348, 390		
Nicholson v. Bradford Union ...	117		
— v. Gorch .....	191, 456		
Nicholson & Venn v. Smith			
Marriott .....	616		
Nicholl & Knill v. Ashton,			
Edridge & Co. ....	237		
Niel v. Clave .....	515, 516		
Niles v. Isant .....	322		
Nimble v. N. W. Ry. ....	272		
Nightingale v. P. S. Co. ....	461, 567		
Nimchoy, The .....	707		
Nisbet v. Ryrie .....	571		
Nordals Tønder v. v. Bris-			
tor .....	467		
Norris, The .....	91		
Norie v. Harris .....	357		
Norton v. Ashburton ..	107-8, 111, 257		
Norden v. Johnson .....	308-9		
Nordenfeldt v. M. Nordenfeldt			
Co. ....	188-9		
		O.	
		Oakes v. Furquand .....	23, 110, 118
		Oakley v. Lyster .....	13, 326, 7
		Ocean Accident Corp. v. Ilford	
		Gas Co. ....	317
		Ode-sa, The .....	584, 701
		Oford v. Davies .....	572
		Ogden v. Benas .....	772
		Ogden, Ltd. v. Nelson .....	187, 488
		Ogilvie v. Forth .....	69
		O'Grady v. Senior .....	317, 323
		Olchampton, The .....	621
		Oliver v. Birmingham Motor Co.	577
		— v. Collins .....	757
		— v. Davis .....	711
		— v. Hunting .....	66
		— v. Woolf .....	452
		Olley v. Marlborough Court .....	360
		O'Neill v. Armstrong .....	517
		Onslow, <i>Re</i> .....	85
		Onward, The .....	625
		Oppenheim v. White Lion Hotel	562
		Oppenheimer v. Attenborough ..	661

	PAGE		PAGE
Oppenheimer v. Fraser .....	660, 661	Parsons v. Equitable Investment Co.	710
Oram v. Hutt .....	417-8	Pasley v. Freeman .....	420
Orchard v. Bush .....	589, 590	Pasmore v. Oswaldtwistle U.D.C.	256
— v. Connaught Club .....	586	Passingham v. King .....	461
Ord v. Ord .....	88	Paterson v. Gandasequi .....	181
Oriental S.S. Co. v. Tylor ..	614, 621, 624	Paterson S.S. Co. v. Canadian Wheat Producers .....	626
Ormiston v. G. W. Ry. ....	295	Patrick v. Colerick .....	319, 321
O'Rorke v. Bolingbroke .....	112	— v. Russo-British, etc., Co. .	239
Orton v. Butler .....	9	Patscheider v. G. W. Ry. ....	612
Osborn v. Boulter .....	446	Patninson v. Luckley .....	207
— v. Chocqueel .....	394	Pattison v. Jones .....	414
O'Shea, <i>Re</i> .....	178, 181	Payne v. Leconfield (Lord) .	189
O'Sullivan v. Thomas .....	183	— v. Mayor of Brecon .....	177
Oswald v. Grey (Earl) .....	801	Paynter v. James .....	93
Otto v. Bolton and Norris ..	864	Payzu v. Hannaford .....	515
Ottoman Bank v. Chakarian .	517, 528	— v. Saunders .....	225, 235, 664
Oughton v. Seppings .....	80	Pearce v. Brain .....	132, 135
Overend, Gurney & Co. v. Gibb .	454	— v. Brooks .....	175, 187, 678
Overton v. Hewett .....	150	— v. Foster .....	516
Owen v. Homan .....	71, 551	— v. Gardner .....	66
— v. Nicholl .....	801	Pearl Mill Co. v. Ivy Tannery .	223
— v. Van Uster .....	739	Pearse v. Boulter .....	469
Oxford Corpn. v. Crow .....	475	Pearson, <i>Re</i> .....	470
		— v. Coleman .....	387, 390
		— v. Goschen .....	625
		— v. Lambeth B. C. ....	386
		— v. Seligman .....	421
		— v. Spencer .....	359
		Pease v. Chaytor .....	268
		Peck v. Gurney .....	103, 106, 109
		— v. N. Staffs. Ry. .	604, 605, 606
		Pegler v. Ry. Ex. ....	223
		Peirce v. London Repository .	639
		Pemberton v. Hughes .....	89
		Penman v. Fife Coal Co. ....	521
		Pennington v. Brinsop .....	352
		— v. Crossley .....	216
		— v. Reliance Motor Works .	639, 700
		Pennsylvania S.S. Co. v. Compagnie Nationale .....	102
		Penny v. Wimbledon U. C. ....	302
		Percival v. Dunn .....	199
		— v. L. C. C. Asylum, etc. .	38
		Percy v. Glasgow Corpn. .	294-5, 297
		Perry v. Nat. Prov. Bank .....	330
		— v. Suffield .....	40
		— v. Turner .....	214
		Pesqueras y Secaderos de Bacula de España S.A. v. Beer .....	565
		Pessey-Moody v. Catt .....	678
		Peter v. Compton .....	57
		Peters v. Fleming .....	129-9
		— v. Jones .....	108
		— v. Prince of Wales Theatre	319
		Peto v. Blaydes .....	615
		— v. Reynolds .....	731
		Petrie v. MacFisheries .....	517, 523

## P.

Padbury v. Holliday .....	301
Page v. L. M. S. Ry. ....	612
— v. Morgan .....	689
Palgrave, etc., Ltd. v. S.S. "Turid" .....	97
Palmer v. Crone .....	268
— v. Mallett .....	25
— v. Pratt .....	735
Palmer & Co., <i>Re</i> .....	812
Palmolive, Ltd. v. Freeman .	174
Pape v. Westacott .....	455
Pappa v. Rose .....	269
Paquin v. Beaulerk ....	167, 490, 493
Parker v. Crisp .....	641
— v. G. W. Ry. ....	116
— v. Guinness .....	217
— v. McKenna .....	458, 460
— v. Mason .....	462
— v. Miller .....	299, 369
— v. S. E. Ry. ....	29-32
— v. Winlow .....	481
Parkfield Trusts v. Curtis .	157-8
— v. Dent .....	113, 158
Parkinson v. College of Ambulance	166, 188, 190
— v. Lee .....	20
Parmiter v. Coupland .....	425
Parr v. Snell .....	26
Parsons, <i>Ex p.</i> (1886) .....	715
—, <i>Re</i> (1898) .....	718
— v. Brand .....	717

	PAGE		PAGE
Petty v. Parsons .....	359	Porter v. Freudenberg .....	115
Petty v. Cooke .....	549	— v. Port of Liverpool Stevedoring Co., Ltd. ....	525
Phelps v. L. & N. S. W. Ry. ....	618	Portman v. Griffin .....	591
Phillips v. Alhambra Palace Co. ....	187	Portuguese Copper Mines, <i>Re</i> ...	475
— v. Britannia Laundry .....	257	Potelakhoff v. Teakle .....	185
— v. Brooks .. 23, 110, 121, 657, 659		Potter v. Peters .....	61, 68
— v. Eyre .....	275	Potts v. Reid .....	377
— v. Foxall .....	531	Poulton v. L. & S. W. Ry. ....	295-6
— v. Homfray .....	101, 280	Poussard v. Spiers .....	517
— v. L. & S. W. Ry. ....	253	Powell v. Fall .....	330
— v. Philips .....	803	— v. Gelston .....	426
— v. Warren .....	217	— v. Kempton Park .....	181
Phillipson v. Hayter .....	490, 492	— v. Lee .....	35
Plapp v. Ingram .....	807	— v. Smith .....	476
— v. Rogers .....	97, 515	Powell and Thomas v. Evan Jones & Co. ....	458, 460
Phoenix Assoc. v. Spooner ..	572	Power v. British India S.S. Co. ....	515
Pickard v. Smith .....	302, 378	Pownall v. Ferrand .....	77
Picker v. London and County Bank ..	723	Prager v. Batspiel .....	473
Pickering v. Hfracombe Ry. ....	157	Pratt v. British Med. Assoc. ....	399
Pickford v. Grand Junction Ry. ....	596	— v. Cook .....	82, 227, 520
Pilley v. Robinson .....	25	— v. Patrick .....	299
Pinet v. Maison Louis Pinet ....	424	— v. S. E. Ry. ....	613
Pinnell's Case .....	214-5	Preece v. Gilling .....	708
Pinnington v. Galland .....	359	Preist v. Last .....	619
Pippin v. Sheppard .....	218	Prested Miners' Co. v. Garner ..	698
Pirie v. Richardson .....	26	Preston v. Dania .....	242
Pittard v. Oliver .....	146	— v. Luck .....	123
Place v. Searle .....	405-6	— v. Mercer .....	313
Planché v. Colburn .....	81, 222, 224	Pre-twich v. Poley .....	494
Plant v. Bourne .....	61	Price v. Barker .....	550
Plaswood Collieries v. Partridge ..	785	— v. Easton .....	12
Plating v. F. Farquharson .....	417	— v. Hilditch .....	358
Playfair v. Mu-grove .....	314	— v. Metropolitan, etc., Co. ....	461
Pluckwell v. Wilson .....	273	— v. Moulton .....	71
Plumb v. Cobden Mills .....	297, 556	— v. Price .....	217
Plummer v. Gregory .....	505	— v. Rhondda U. D. C. ....	27
Plumlett v. Barclays Bank .....	768	Price, Davies & Co. v. Smith ....	464
Polar Trading Co. v. Tagher ....	510	Prickett v. Badger .....	466
Polak v. Everett .....	550	Priestley v. Fernie .....	484
Poland v. Farr .....	294, 297	— v. Fowler .....	526
Pole v. Leask .....	451, 468	Pritchett v. English, etc., Syndicate .....	84
Polemis and Furness, Withy, <i>Re</i> ...	285, 600, 626	Provincial Insee. Co. v. Morgan ..	554, 555
Poilegless v. Oliver .....	219	Pugh v. Jenkins .....	178
Poll v. Water .....	107, 479, 757	Pulbrook v. Ashby .....	708
Pollakorn v. Wright .....	308-9	— v. Laves .....	67
Poll v. Forcham .....	266	Pullman v. Hill .....	426, 428, 446
Pollitt, <i>See</i> .....	157	Purves v. Lande'l .....	495
Polsue v. Ruhnau .....	314	Putman v. Taylor .....	172, 187
Ponsford v. Swaine .....	813		
Pontardave R. v. C. Moore Gwyn ..	315		
Pontida, The .....	685		
Ponting v. Noakes .....	358		
Pontypidd Union v. Drew .....	125		
Poole v. Clarke & Co. ....	465		
Poplett v. Stockdale .....	160		
Popplewell v. Hedmonson .....	357		
Port Victor, Carpenters .....	568		

## Q.

Quarman v. Burnett .....	303
Quarrier v. Colston .....	181
Quartz Hill Co. v. Eyre .....	113

	PAGE		PAGE
Quenerduaine v. Cole .....	31	Rainham, etc., Works v. Belvedere Co. ....	347
Quinn v. Leatham .....	252, 251, 399, 400-1	Raisin v. Mitchell .....	372
Quirk v. Thomas .....	233	Ralli v. Compagna, etc., Y. Aznar .....	210
		Ramsay v. Margrett .....	706, 708, 711
		Ramsgate Hotel v. Montefiore ..	31
		Rand v. Craig .....	294, 298
		Rann v. Hughes .....	11
		Raphael v. Bank of England ..	722, 724
		Rashdall v. Ford .....	105
		Ratcliffe v. Evans .....	237-8, 251, 125, 149
		Rawlinson v. Ames .....	67
		Rawstron v. Taylor .....	351
		Raymond v. Fitch .....	194
		Rayner v. Mitchell .....	298
		— v. Preston .....	571, 572
		Rayson v. S. London Tramways ..	111
		Read v. Anderson .....	177, 180, 186
		— v. Coker .....	305
		— v. Dean .....	679
		— v. Edwards .....	309-1
		— v. Goldring .....	219
		— v. G. E. Ry. ....	275
		— v. Lyons .....	340, 317
		— v. Rann .....	183
		Reading Trust v. Spero .....	65, 158
		Reading's Petition of Right ....	521
		Real & Personal Advance Co. v. Clears .....	719
		Reardon Smith Line v. Black Sea, etc., Insurance .....	94
		Reckitt v. Barnett .....	472
		Reddaway v. Banham .....	422-4
		Reddie v. Scott .....	109
		Rederiaktie-elskabet Superior v. Dewar .....	625
		Redford v. Armstrong Whitworth Co. ....	735
		Redgrave v. Hurd .....	106, 108
		Reece v. Taylor .....	508
		Reed v. Dean .....	679
		— v. Goody .....	166
		— v. G. W. Ry. ....	517
		— v. Page .....	617, 627
		— v. Royal Exchange .....	779
		Reddie v. L. & N. W. Ry. ....	394
		Rees v. Berrington .....	771
		— v. De Bernardy .....	166, 178
		Reeve v. Conyngham .....	402
		— v. Jennings .....	55
		— v. Palmer .....	325
		— v. Reeve .....	173
		Reeves v. Barlow .....	710
		— v. Butcher .....	227
		— v. Capper .....	701
		Regier v. Campbell Stuart .....	459
		Reigate v. Union Manufacturing Co. ....	481
R. v. Adams .....	426		
— v. Ardley .....	108		
— v. Ashton .....	178		
— v. Bartholomew .....	387		
— v. Blakemore .....	779		
— v. Bryan .....	105		
— v. Burgon .....	587		
— v. Canterbury (Archbp.) ..	786		
— v. Carlile .....	85, 388		
— v. Clement .....	82		
— v. Cleworth .....	161		
— v. Cooke .....	583		
— v. Cross .....	336		
— v. Demers .....	88		
— v. Driscoll .....	308		
— v. Essex C. C. Judge .....	285		
— v. Fursey .....	311		
— v. Garland .....	337		
— v. Great Bowden .....	514		
— v. Hampreston .....	514		
— v. Hardey .....	779		
— v. Higgins .....	589		
— v. Hopley .....	275		
— v. Humphery .....	93		
— v. International Trustee, etc. 92-3			
— v. Ivens .....	589		
— v. Jackson .....	405		
— v. Lefroy .....	82		
— v. Longton Gas Co. ....	398		
— v. McDonald .....	583, 584		
— v. Mahon .....	280		
— v. Moore .....	338		
— v. Negus .....	451		
— v. Neville .....	341		
— v. Newport (Salop) Justices ..	275		
— v. Pagham .....	251		
— v. Pedley .....	315		
— v. Pratt .....	311		
— v. Price .....	311		
— v. Roe .....	636		
— v. Rymer .....	590		
— v. St. George's Union .....	58		
— v. Train .....	338		
— v. Walker .....	451		
— v. Watts .....	387, 311		
— v. Whitchurch .....	411		
Radcliffe v. Ribble .....	526		
Radley v. L. & N. W. Ry. ....	873-4		
Raffles v. Wichelhaus .....	117		
Rainbow v. Howkins .....	471, 489		
Raingold v. Bromley .....	40		

	PAGE		PAGE
Rein v. Stein .....	216	Robson v. Drummond .....	192
Reinhardt v. Mentasti .....	848	— v. Premier Oil Co. ....	165
Reinhold, <i>Re</i> .....	812	Rochevoucauld v. Boustead ....	67
Reis, <i>Re</i> .....	706	Rodiek v. Gaudell .....	198
Rely-a-Bell Alarm Co. v. Ewler ..	215	Rodocanachi v. Milburn ....	240, 621
Repetto v. Millars, Ltd. ....	481, 484	Roe v. Naylor .....	29-31
Reuss v. Picklesley .....	61	— v. Tranmarr .....	96
Reuter v. Sala .....	99	Roff v. British Mfgng. Co. ....	444, 446, 796
Reynell v. Sprye .....	166, 190	Roffey v. Henderson .....	320
Reynolds v. Atherton .....	34	Rogers, <i>Ex p.</i> .....	182
— v. Clarke .....	818	— v. Ingham .....	125
— v. Doyle .....	746	— v. Lambert .....	331, 587
Rhodes, <i>Re</i> .....	125, 144	— v. Martin .....	683
— v. Fielder .....	495	— v. Whiteley .....	768
— v. Forwood .....	4-6, 468	Rolfe v. Abbott .....	182
Rhondda's (Viscountess's) Claim ..	96	— v. Flower .....	204
Ricardo v. Garcias .....	90	Rolin v. Steward .....	236, 767
Richards v. Heather .....	25	Romney Marsh Bailiffs v. Trinity House .....	241
— v. L. B. & S. C. Ry. ....	611, 612	Ronald, <i>Ex p.</i> .....	185
Richardson v. Harris .....	710	Roscorla v. Thomas .....	43, 644
— v. N. E. Ry. ....	595	Rose v. Ford .....	280, 287
— v. Rowntree .....	30-1	Rose & Frank v. Crompton ..	21, 94
— v. Silvester .....	420	Rosefield v. Prov. Union Bank ..	718
Richmond v. Smith .....	591	Rosen v. Dowley .....	812
Rickards v. Lothian .....	348-9	Rosenbaum v. Belson .....	469
Ricketts v. Tilling .....	295, 299	Rosenthal v. Alderton .....	325
Ridgway v. Hungerford Market ..	517	Rosewarne v. Billings .....	180
— v. Wharton .....	63, 65	Ross v. London County, etc., Bank .....	774
Riding v. Smith .....	150	Rossdale v. Denny .....	39-40
Ridley v. Ridley .....	57	Rossiter v. Miller .....	39
Rigby v. Benne't .....	356	Rotherham Co., <i>Re</i> .....	100
Rist v. Faux .....	409	Roundwood Colliery Co., <i>Re</i> , Lee v. Roundwood, etc. ....	709
Ritchie v. Atkinson .....	206	Rouse v. Bradford Bank .....	551
River Tone Commrs. v. Ash ....	146	Rousillon v. Rousillon .....	90
River Wear Commrs. v. Adamson ..	255	Routledge v. Grant .....	83, 88
Robarts v. Tucker .....	742	Rowland v. Divall .....	52, 616
Robb v. Green .....	462	Rowlands v. Wright .....	533
Robbins v. Jones .....	380	Royal Aquarium v. Parkinson ..	269, 438-40
Roberts, <i>Re</i> .....	705	Royal College of Veterinary Surgeons v. Kennard .....	155
— v. Brett .....	206	Royal Exchange v. Hope .....	101
— v. Gray .....	130	Rubel Bronze Co. & Vos, <i>Re</i> ..	516, 527
— v. Marsh .....	730	Ruben v. Faire Bros. & Co. ...	651, 667
— v. Rose .....	337	— v. Great Fingall Co. ....	472
— v. Smith .....	525	Ruck v. Williams .....	367
Robertson v. French .....	97	Rumball v. Metropolitan Bank ..	723
Robins v. Bridge .....	496	Rumsey v. N. E. Ry. ....	700
— v. Gray .....	591	Ruoff v. Long .....	369
Robins v. Cook .....	219	Russell, <i>Ex p.</i> .....	73
— v. Davison .....	270	— v. Bell .....	50
— v. Gesel .....	25	— v. Niemann .....	593
— v. Graves .....	637, 638	— v. Russell .....	734
— v. Harman .....	235		
— v. Kilvert .....	344		
— v. Lynes .....	111		
— v. Mollert ....	76, 151, 159, 176		
— v. Rutter .....	150, 697		
— v. Walter .....	591		
— v. Ward .....	156		



	PAGE
Russo-Chinese Bank <i>v.</i> Li Yan Sam .....	471
Rutter <i>v.</i> Palmer .....	586, 588
Ryall <i>v.</i> Kidwell .....	381
Ryalls <i>v.</i> Leader .....	441
Ryan <i>v.</i> Sams .....	492
Ryder <i>v.</i> Wombwell .....	129, 130
Rylands <i>v.</i> Fletcher .. 341, 345, 347-9,	350, 391

S.

Sachs <i>v.</i> Henderson .....	247
— <i>v.</i> Miklos .....	325, 473, 586
Sack <i>v.</i> Jones .....	356
Sadgrove <i>v.</i> Hole .....	426, 447
Sadler, <i>Re</i> .....	587
— <i>v.</i> Smith .....	80
— <i>v.</i> S. Staffs. Tramways .. 271, 303	
Sadlers' Co. <i>v.</i> Badcock .....	571
Saffery <i>v.</i> Mayer .....	180, 182
Sagar <i>v.</i> Ridehalgh .... 519, 522, 523	
Said <i>v.</i> Butt .....	120
St. Helens Colliery <i>v.</i> Hewitson	524
St. Helens Smelting Co. <i>c.</i>	
Tipping .....	341, 343, 349
Salaman, <i>Ex p.</i> .....	502, 705
— <i>v.</i> Sec. of State for India ..	268
Salford (Mayor of) <i>v.</i> Lever ....	461
Salkeld, <i>Re</i> .....	747
Salomon <i>v.</i> Salomon & Co. .. 146-148,	502
Salt Union <i>v.</i> Brunner Mond ..	355
Salton <i>v.</i> New Beeston Cycle Co.	487
Salvin <i>v.</i> N. Brancepeth Coal Co.	341
Sampson <i>v.</i> Hoddinott .....	351
Samson <i>v.</i> Aitchison .....	299, 353
Samuel <i>v.</i> Newbold .....	114
— <i>v.</i> West Hartlepool, etc., Co.	622
Sandemann <i>v.</i> Scurr .....	614
Sanders <i>v.</i> Maclean .....	623
— <i>v.</i> Teape .....	393
Sanderson <i>v.</i> Collins .....	298
Sandiman <i>v.</i> Breach .....	161
Saner <i>v.</i> Bilton .....	95
Santos <i>v.</i> Illidge .....	186
Sapwell <i>v.</i> Bass .....	237
Sarfon <i>v.</i> Roberts .....	380
Satanita, The .....	26, 630
Saunders <i>v.</i> Graham .....	219
— <i>v.</i> Holborn Board of Works	257
— <i>v.</i> White .....	718
Saunderson <i>v.</i> Jackson .....	62
Savile <i>v.</i> Roberts .....	410
Sawyer & Vincent <i>v.</i> Window	
Brace .....	124
Saxby <i>v.</i> Fulton .....	181, 186
Sayer <i>v.</i> Wagstaff .....	216

	PAGE
Scaifo <i>v.</i> Farrant .....	596
Scammell <i>v.</i> Ouston .....	37, 91, 682
Scammell & Nephew, Ltd. <i>v.</i>	
Hanley .....	278
Scaramanga <i>v.</i> Stamp .....	627
Scarborough <i>v.</i> Cosgrove .....	590
Scarf <i>v.</i> Jardine .....	201
Scarfe <i>v.</i> Morgan .. 161, 183, 698,	700
Scarpellini <i>v.</i> Atcheson .....	141
Scarr <i>v.</i> Gen. Accident Ins. ....	576
Schaffenius <i>v.</i> Goldberg .....	115
Schiller, Cargo ex .....	568
Schmalz <i>v.</i> Tomlinson .... 100, 158	
Schmalz <i>v.</i> Avery .....	182
Schneider <i>v.</i> Heath .....	103
— <i>v.</i> Norris .....	62, 63
Scholey <i>v.</i> Central, etc., Ry. ....	110
Scholfield <i>v.</i> Lonsborough .....	754
Schotsmans <i>v.</i> Lanes & York Ry.	600
Scotthorn <i>v.</i> Staffordshire Ry. ...	670
Scotson <i>v.</i> Pegg .....	19
Scott <i>v.</i> Alvarez .....	6
— <i>v.</i> Avery .... 164, 778, 782,	614
— <i>v.</i> Brown, Doering Co. ....	180
— <i>v.</i> Coulson .....	119
— <i>v.</i> Ebury (Lord) .....	223
— <i>v.</i> London Dock Co. ....	305
— <i>v.</i> Morley .....	137, 111
— <i>v.</i> Pattison .....	67
— <i>v.</i> Scott .....	114
— <i>v.</i> Seymour (Lord) .....	270
— <i>v.</i> Shepherd .....	8, 285, 306
— <i>v.</i> Stansfield .....	265
— <i>v.</i> Uxbridge, etc., Ry. ....	202
Scriven <i>v.</i> Hindley .....	117
Seager, <i>Re</i> .....	264
Seagrave <i>v.</i> Union Marine Ins.	
Co. ....	760
Sealey <i>v.</i> Tandy .....	590
Seale <i>v.</i> Wallbank .....	1, 7
Seaton, <i>Ex p.</i> .....	86
— <i>v.</i> Benedict .....	191
— <i>v.</i> Heath .....	104
Seddon <i>v.</i> N. E. Salt Co. ....	110
Sedleigh-Denfield <i>v.</i> O'Callaghan	
340, 375	
Seear <i>v.</i> Cohen .....	115
Seed <i>v.</i> Bradley .....	710, 718
Seldon <i>v.</i> Wilde .....	111
Seligman <i>v.</i> Eagle Ins. Co. ....	146
Sellen <i>v.</i> Norman .....	523
Semon <i>v.</i> Bradford Corp'n. ....	57
Serff <i>v.</i> Acton Local Board .....	339
Serrao <i>v.</i> Noel .....	85
Seton <i>v.</i> Slade .....	1-6
Sewell <i>v.</i> Burdick .....	621, 623
— <i>v.</i> Natl. Telephone Co. ....	370
Seymour <i>v.</i> Kingscote .....	490
— <i>v.</i> Pickett .....	218

## TABLE OF CASES

xli

	PAGE		PAGE
Shackell v. Rosier .....	187	Sinclair v. Brougham .....	7, 79, 80
Shacklock v. Ethorpe .....	592	Singer, etc., Co. v. Clark .....	703
Shadwell v. Shadwell .....	49	— v. Loog .....	422-4
Shaer, <i>Re</i> .....	503	Singleton Abbey S.S. v. Paludina	
Shapiro v. La Morta .....	450	S.S. ....	287, 371, 373
Shardlow v. Cottrell .....	60, 61	Sinnot v. Bowden .....	572
Sharman v. Brandt .....	63	Siquiera v. Noronha .....	77
Shaw, <i>Re</i> .....	803	Siveyer v. Allison .....	161
— v. Benson .....	147	Six Carpenters' Case .....	315
— v. G. W. Ry. ....	608, 606	Skarp, The .....	620
— v. Neale .....	497	Skeate v. Beale .....	116
Shayler v. Wood .....	752	Skelton v. L. & N. W. Ry. ..	367, 368
Shears v. Jones .....	709	Sketchley v. Berger .....	359
Sheffield v. Eden .....	496	Skilton v. Ep-om & Ewell U. D. C.	258
— v. London Jt. Stock Bank ..	725	Skinner v. Weguelin .....	158
Sheffield Corpn. v. Barclay ..	467, 479	Skull v. Glenister .....	339
Sheffield, etc., Society, <i>Re</i> .....	146	Slater v. Hoyle & Smith .....	210
Shelfer v. City of London Elec-		— v. Jones .....	215
tric Co. ....	292	— v. Parker .....	491
Shelton v. Springett .....	132	— v. Worthington's Cash Stores	340
Shenstone v. Freeman .....	683	Slingsby v. District Bank ....	767, 771
Shepherd v. Brand .....	808	— v. Westminster Bank .....	723
Shepherd v. Whitaker .....	427	Small v. Nat. Prov. Bank .....	705
Shepherd v. Bristol & Exeter Ry.	601	Smart v. Sandars .. 451, 155, 186,	188
— v. Croft .....	104	Smart Bros. v. Holt .....	683
— v. Hills .....	51, 82	— v. Pratt .....	693
— v. Kaine .....	647	Smith v. Algar .....	50
Shiels v. Blackburne .....	365	— v. Anderson .....	147, 500
Shipley T. D. C. v. Bradford		— v. Baker .....	525
Corpn. ....	126	— v. Bedouin Navigation Co.	621
Shipway v. Broadwood .....	461	— v. Brown .....	723
Shirlaw v. Southern Foundries ..	76	— v. Chadwick .....	106-7
Shurey, <i>Re</i> .....	126	— v. Cook .....	396
Sibree v. Tripp .....	314	— v. Cornhill Ins. Co. ....	576
Silver v. Ocean S.S. Co. ....	620	— v. Cox .....	214
Silvester, <i>Re</i> .....	552	— v. Enright .....	321
Sim v. Stretch .....	425, 436	— v. General Motor Cab Co. ..	301
Simmons, <i>Ex p.</i> .....	125	— v. Giddy .....	341
— v. Heath Laundry ....	451, 518	— v. Gold Coast Explorers,	
— v. I. heral Opinion .....	479, 496	Ltd. ....	50
— v. L'lystone .....	323	— v. Hughes .....	123
— v. Mitchell .....	430	— v. Kay .....	114-15
— v. Rose .....	495	— v. Keal .....	366
— v. Woodward .....	718	— v. Kenrick .....	347, 319
Simms, <i>Re</i> (1934) .....	382	— v. King .....	183
Simon v. Islington Borough Coun-		— v. Lanes & Yorks Ry. ....	537
cil .....	25-6	— v. Land, etc., Corpn. ....	105
— v. Lloyd .....	216	— v. L. & N. W. Ry. ....	607
Simpson v. Eggington .....	214	— v. L. & S. W. Ry. ....	284, 391
— v. Hughes .....	22, 36	— v. McGuire .....	176
— v. Lamb .....	466, 487	— v. Marrable .....	350
— v. L. & N. W. Ry. ....	240	— v. Mawhood .....	162
— v. Margaretton .....	92	— v. Moss .....	270
— v. Nicholls .....	161	— v. National Meter .....	440
— v. Savage .....	315	— v. Nicholls .....	81, 87, 69
Sims v. Bond .....	480	— v. Parker .....	436
— v. Brittain .....	458	— v. Prosser .....	740
— v. Midland Ry. ....	473, 597	— v. Pryman .....	616, 621
Sinclair v. Bowles .....	221	— v. Ridgway .....	95

	PAGE		PAGE
Smith v. Roche .....	45	Speight v. Gaunt .....	453
— v. Scott .....	441	— v. Oliviera .....	409
— v. Selwyn .....	249	Spence v. Eastern Counties Reg. ....	301
— v. Surman .....	59, 65	Spencer v. Harding .....	28
— v. Union Bank of London ..	772	— v. Hemmerde .....	230
— v. Vertue .....	738	Spice v. Bacon .....	593
— v. Webster .....	63, 469	Spirett v. Willows .....	73
— v. Wheatoroft .....	120-1	Spooner v. Browning .....	177
— v. Whiteman .....	712	Spottiswoode Ballantyne v. Doreen Appliances .....	40
— v. Wilson .....	97	Springer v. G. W. Ry. ....	173, 397
— v. Wood .....	551	Sprye v. Porter .....	418
— v. Woodfine .....	236	Square v. Model Farm Dairies ..	256
Smith, Fleming & Co., Re .....	25	Stag Line v. Bog Trade .....	619
Smitton v. Orient Navigation ..	629	Stainbank v. Shepard .....	634
Smyth v. Smyth .....	97	Standard Mfg. Co., Re .....	706
Sneesby v. L. & Y. Ry. ....	284-5	Stanford, Ex p. ....	717, 719
Sneyd, Re .....	86	Stanley v. Powdeswell .....	37
Snook v. Davidson .....	698	— v. Powell .....	307
Snow v. Whitehead .....	346	Stanley & Co. v. Solomon, Ltd. ....	545
Snowball, Ex p. ....	487	Stanton v. Richardson .....	617
Soars v. Rahn .....	631	Starkey v. Bank of England ....	479
Soblomsten, The .....	621	Startup v. Macdonald .....	218
Société Belge v. London & Lancs Ins. ....	478, 566	Stand v. Salt .....	505
Société des Hotels, etc. v. Cum- mings .....	214	Steamship Den of Airlie Co. v. Mitsui Co. ....	788
Société de Paris v. Tramways Union .....	478	Stearns Co. v. Heintzmann ....	154
Société du Paris Plage v. Baum- gart .....	181	Stearn v. Prentice .....	348
Sodergren v. Flight .....	625	Steeds v. Steeds .....	201
Solicitor, A, Re (1912) .....	419	Steel Wing Co., Re .....	196
Solomon v. Brownfield .....	465	Steele v. Brannan .....	111
Soltykoff, Re .....	132, 741	— v. Glasgow Iron and Steel Co. ....	530
Somersset, Re .....	230	— v. Gourley and Davis .....	150
Somes v. Brit. Empire Ship. Co. — v. Spencer .....	699, 475	— v. McKinlay .....	761
Sorrell v. Paget .....	564	Steinberg v. Scala, Ltd. ....	135
— v. Smith .....	399, 400, 403	Stella, The .....	611, 629
Sorsbie v. Park .....	25	Stephen v. Cooper .....	536
Souch v. Strawbridge .....	57	— v. International Car Co. ..	32
South Hetton Co. v. N. E. News Association .....	261, 430	Stephens v. Badcock .....	458
South of England Natural Gas Co., Re .....	109	— v. Dudbridge .....	742
South of Ireland Colliery Co. v. Waddle .....	149	— v. Elwall .....	328
South Staffs Trams v. Sickness, etc., Assoc. ....	98	— v. Junior Army and Navy Stores .....	97
South Staffs Water Co. v. Shar- man .....	338	— v. Myers .....	305
South Wales Miners v. Glamorgan Coal Co. ....	275, 399, 401, 426	Stephenson v. Garnett .....	89
South Wales Ry. v. Wythes ....	790	— v. Hart .....	601
Sovereign Life Assce. Co., Re ..	461	— v. Thompson .....	706
Sovfracht v. Van Udens, etc. ....	145	Sterns v. Vickers .....	656
Sowler v. Potter .....	120	Stenart v. Wilkins .....	20
Spargo's Case .....	214	Stevens v. Biller .....	158, 608
Spears v. Hartley .....	698	— v. Hill .....	731
		— v. Lee .....	456
		— v. Marston .....	708
		Stevenson v. Aktiengesellschaft für Cartonnagen Industrie ....	116
		— v. Maclean .....	33, 36
		Steward v. Gromett .....	111
		Stewart v. Casey .....	43-4

## TABLE OF CASES

xliii

Stewart v. Kennedy .....	126
Stewart & Son v. Longhurst .....	533
Stickney v. Keeble .....	98, 99
Stiles v. Cardiff Nav. Co. ....	395
Stilk v. Myrick .....	49
Stimson v. Grey .....	91
Stirling v. Maitland .....	487
Stirt v. Drungold .....	501
Stock v. Inghs .....	533
Stocks v. Wilson .....	129, 182, 187
Stoddart v. Union Trust .....	197
Stokes v. Whicher .....	59, 65
Stollmeyer v. Trinidad Petroleum Co. ....	351
Stone v. Godfrey .....	123
Stoneham v. Ocean Assce. Co. ..	551
Storv v. Ashton .....	208
Stott v. Shaw .....	710, 712
Strachan v. Universal Stock Exchange .....	183
Strathnaver, The .....	508
Streatham Cinema v. John McLauchlan .....	177, 187
Street v. Blay .....	220
Strickland v. Turner .....	51-2
Strong v. Foster ...	531
Stuart v. Bell .....	113
Stubbs v. Holywell Ry. ....	191
— v. Slater .....	701
Sturges v. Bridgman .....	342
Suffell v. Bank of England ..	207, 761
Summer v. Solomon .....	477, 488
Sumner v. Browne .....	640
— v. Webb .....	650
Sumpster v. Hedges .....	221
Sunley v. Cunard White Star ...	240
Sutcliffe v. Clients Investment Co. ....	382, 385
— v. G. W. Ry. ....	596
Sutherland v. Stopes .....	486-8
Sutton v. Bootle Corpn. ....	386, 387
— v. Clarke .....	265
— v. Gray .....	516
— v. Tatham .....	78
Svensen v. Wallace .....	567
Swain v. Southern Ry. ....	258, 278
Swainson v. N. E. Ry. ....	68
Sweet v. Lee .....	23, 56, 67
— v. Pym .....	607
Sweeting v. Pearce .....	155
Swift v. Jew-bury .....	122
— v. Maclean .....	210
— v. Pannell .....	711
Swindon Waterworks v. Wilt-Canal Co. ....	352
Swinfen v. Chelmsford (Lord) ..	150
Swire v. Francis .....	458
— v. Leach .....	70

	PAGE
Sydney Municipal Council v. Bourke .....	258
Sykes v. Beadon .....	456
— v. Giles .....	470
T.	
Taff Vale Ry. v. Jenkins .....	290
Tailby v. Official Receiver .....	612
Talley v. Gt. W. Ry. ....	611
Tamplin v. James .....	117
Tamplin S.S. Co. v. Anglo-American Co. ....	208
Tamvaco v. Simpson .....	625
Tancred v. Delagoa Bay Co. ....	185
— v. Leyland .....	334
Tarrant v. Webb .....	525
Tarry v. Ashton .....	302, 398
Tatam v. Reeve .....	180
Tattersall v. Drysdale ....	100, 558, 577
Taxation Commrs. v. English, etc., Bank .....	773
Taylor v. Bank of N. S. Wales ..	551
— v. Bowers .....	188
— v. Brewer .....	463, 513
— v. Caldwell .....	208-9, 585
— v. Chester .....	1-8
— v. G. E. Ry. ....	641
— v. Manchester, etc., Ry. ..	246-7
— v. Meads .....	138
— v. Nesfield .....	268
— v. Newman .....	323
— v. Twinberrow .....	227
— v. Webb .....	206
— v. Willans .....	412
— v. Yielding .....	785
Taylor, Stileman and Underwood, Re .....	496, 700
Teal, The .....	629
Temperley S.S. Co. v. Smyth ..	631
Templeman and Reed, Re ..	795, 808
Tempus Shipping v. Dreyfus ..	567, 629
Tenant v. Goldwin .....	313, 341
Tennant v. Elliott .....	191, 156
Terry v. Hutchinson .....	408-9
Thacker v. Hardy .....	178, 182, 466
— v. Wheatley .....	182
Thames Ironworks v. Patent Derrick Co. ....	600
Tharpe v. Stallwood .....	322
Thellusson, Re .....	125
Thirkell v. Cambi .....	61, 63-5
Thom v. Sinclair .....	537
Thomas v. Bradbury .....	498
— v. Churton .....	82, 489
— v. Dey .....	182
— v. Hayward .....	198
— v. Kelly .....	177

	PAGE		PAGE
Thomas v. Owen .....	358	Trollope v. Martyn .....	166
— v. Quartermaine .....	274, 528	Tuberville v. Savage .....	306
— v. Searles .....	715	Tuff v. Warman .....	373
— v. Sorrell .....	820	Tulley v. Reed .....	308
— v. Thomas .....	41, 46	Tully v. Howling .....	617
Thompson v. Brighton Corp. ..	258	Tunbolf v. Alford .....	594
— v. Gardiner .....	63	Turbeville v. Whitehouse .....	128
— v. Lacy .....	589, 590, 591	Turgot, The .....	684
— v. L. M. & S. Ry. ....	32	Turner v. Civil Service Assoc. ..	600
Thomson v. Davenport .....	480, 481	— v. Coates .....	307
— v. Weens .....	553	— v. Goldsmith .....	200, 187, 520
Thorley v. Orchis S.S. Co. ....	628	— v. Green .....	108
Thornett v. Fehr & Beers .....	651	— v. Haji Goolam Mahomed	
Thornhill v. Neats .....	204	Azam .....	625
Thorogood v. Bryan .....	376	— v. Mason .....	515, 516
Thorp v. Cole .....	791	— v. Phillippis .....	150
Thorpe v. Brumfitt .....	359	— v. Reeve .....	463
Threlfall v. Borwick .....	594	— v. Robinson .....	514
Thurman v. Wilde .....	265	— v. Sawdon & Co. ....	519, 520
Thwaites v. Coulthwaite ....	182, 191	— v. Stallibrass .....	247, 585
Thynne v. Shove .....	510	— v. Trisby .....	128
Tidswell, Re .....	809	Turnock v. Sartoris .....	702
Tidy v. Battman .....	367, 369	Turpin v. Bilton .....	453
Tiedemann, Re .....	475	Turton v. Turton .....	424
Tillett v. Ward .. 15, 256, 318, 360,	364	Tussaud v. Tussaud .....	123
Tilling v. Dick, Kerr & Co. ....	278	Tweddle v. Atkinson .....	16, 99
Times v. Hutchings .....	683		
Timothy v. Simpson .....	811	U.	
Tingley v. Müller .....	146	Ultzen v. Nicholls .....	500
Tinline v. White Cross Inscc. ....	167	Underwood v. Bank of Liverpool	
Tinn v. Hoffmann .....	34	470, 730, 774	
Todd v. Emly .....	150	— v. Barclays Bank .....	716
— v. Hawkins .....	444	— v. Burgh Castle Syndicate	
— v. Kerrich .....	516	653, 654	
Tolhurst v. Associated Cement		— v. Lewis .....	194
Manufacturers .....	191, 198-9, 200	Unione Stearinerie Lanza, Re ..	803
Tollemache, Re .....	86	United Australia v. Barclays Bank	
Tolley v. Fry .....	181-2	79-80	
Tomkins v. Randell .....	56	United Kingdom Mutual S.S.	
Tomlinson v. L. M. S. Ry. ....	516	Assocn. v. Neville .....	490
Toms v. Wilson .....	96	United Land Co. v. G. E. Ry. ..	359
Toogood v. Spyryng .....	442, 446	United States v. Motor Trucks,	
Tooke v. Bennett .....	158	Ltd. ....	126
Tooth, Re .....	713	United States Shipping Board v.	
Torkington v. Magee .....	191	Strick & Co. ....	617, 619
Torrington v. Lowe .....	480	Universal, etc., Navigation Co.	
Toulmin v. Millar .....	462	v. McKelvie .....	1-1, 1-3
Tournier v. Nat. Prov. Bank ....	768	Universal Stock Exchange v.	
Townsend v. Wathen .....	384	Strachan .....	1-3
Transvaal Lands Co. v. New		Uphill v. Wright .....	177
Belgium, etc., Co. ....	460	Upton v. Gt. Central Ry. ....	537, 538
Travers v. Cooper .....	600	Usbridge Permanent, etc., B. S.	
— v. Gloucester Corp. ....	363	v. Pickard .....	472
Trego v. Hunt .....	171		
Tribe v. Taylor .....	464	V.	
Trickett v. Tomlinson .....	471	Vacher v. London Society of	
Trinidad Asphalt Co. v. Ambard	857	Compositors .....	261
Troilus, The .....	569		
Trollope v. Caplan .....	466		

## TABLE OF CASES

xlv

	PAGE
Vadala v. Lawes .....	89
Valentini v. Canali .....	181
Vanbergen v. St. Edmunds Properties .....	48
Vancouver Brewing Co. v. Vancouver Breweries, Ltd. ....	175
Vandenbergh v. Spooner .....	80
Vandepitte v. Prof. Insce. Corp'n.	101
Vanderkyl v. McKenna .....	784
Vanderpant v. Mayfair Hotel ..	386
Van Laun, <i>Re</i> .....	85
Van Toll v. S. E. Ry. ....	613
Varing, The .....	619
Varley v. Whipp .....	647
Vaspar v. Eddows .....	319
Vaudeville Electric Cinema v. Muriset .....	126
Vaughan v. Hancock .....	57
— v. Menlove .....	367
— v. Taff Vale Ry. ....	367, 391
Venables v. Smith .....	304
Venn v. Tedesco .....	289
Vere v. Cawdor (Lord) .....	322
Vergottis v. Cory .....	618
Verner Jeffreys v. Pinto ....	113, 156
Verry v. Watkins .....	109
Vibert v. Eastern Telegraph ....	515
Victoria, The .....	630
Victorian Syndicate v. Dott ..	156, 162
Vigers v. Cook .....	223-1
— v. Sanderson .....	655
Vignion's Case .....	782
Vince, <i>Re</i> .....	22
Vinden v. Hughes .....	783
Viney v. Bignold .....	782
Vizetelly v. Mudie .....	127
Vooght v. Winch .....	89
Vosper v. Gt. W. Ry. ....	611

## W.

Wade v. Dowling .....	506
— v. L. & N. W. Ry. ....	601
— v. Simeon .....	51
Wade-Gery v. Morrison .....	792
Wadsworth v. Marshall .....	191
Wain v. Walters .....	61
Wainwright v. Bland .....	578
Wait, <i>Re</i> .....	611, 613, 673
Waite v. N. E. Ry. ....	377
Wakefield v. Duckworth .....	195
Wakeford v. Wright .....	135
Wakelin v. L. & S. W. Ry. ....	370, 372-3
Wakely v. Triumph Cycle Co. ..	90
Walford v. Narin .....	639
Walker v. Baird .....	265
— v. Bradford Old Bank ....	197

Walker v. Crystal Palace Football Club .....	513
— v. G. W. Ry. ....	470
— v. Hirsch .....	501
— v. Nussey .....	610
— v. Witter .....	89
— v. York, etc., Ry. ....	605
Wall v. Rederiaktiebolaget Luggade .....	243, 616
Wallasey Local Board v. Gracey	335
Waller v. Loch .....	443
Wallington v. Townsend .....	237
Wallis v. Pratt ....	225, 643, 645, 652
Walmsley v. Cooper .....	206
Walpole v. Canadian North Ry.	279
Walsby v. Anley .....	175
Walsh v. Walley .....	517
Walter v. Everard .....	130-1
Walters v. W. H. Smith ....	311-2
Warburton v. Co-operative Soc.	517
Ward v. Hobbs .....	103, 257
— v. Natl. Bank of N. Z. ....	517
— v. Shew .....	469
— v. Wallis .....	125
— v. Weeks .....	128
Ware and De Freville v. Motor Association .....	399, 400, 402
Ware v. Garston .....	339
Warlow v. Harrison .....	28
Warman v. S. Counties Car Finance Co. ....	681
Warner v. Couchman .....	538
— v. Nelson .....	245
— v. Riddiford (or Burford) ..	309
Warr v. London County Council ..	58
Wason v. Walter .....	110
Waters v. Monarch Life Assurance Co. ....	558
Watkin v. Hall .....	428, 436
Watkins v. Cottell .....	596, 626
— v. Evans .....	718
— v. Nash .....	69
— v. Phillpotts .....	805
— v. Rymill .....	29, 31
Watson v. Davies .....	38
— v. McEwan .....	439
Watt v. Longdon .....	412
Watteau v. Fenwick .....	470, 576
Watts v. Mitsui .....	235
— v. Shuttleworth .....	551
Waud, <i>Ex p.</i> .....	183
Waugh v. Morris .....	177
Wauthier v. Wilson .....	132
Weaver v. Tredegar Iron and Coal Co. ....	535
Webb v. Alexandra Water Co. ..	723
— v. Beavan .....	134
— v. Bird .....	259

	PAGE		PAGE
Webber v. Lee .....	58	White & Sons v. J. & M. White .....	352
— v. Stanley .....	95	Whitehall Court v. Edlinger .....	210
Webster v. Cecil .....	123	Whitehead v. Lord .....	491
— v. De Tastet .....	454	Whitehorn v. Davison .....	639
— v. Higgins .....	690	Whitehouse v. Pickett .....	593
Weddle v. Hackett .....	183	Whiteley v. Hilt .....	200, 325
Wegg-Prosser v. Evans .....	506	Whitley Partners, <i>Re</i> .....	153
Wehner v. Dene S.S. Co. ....	622	Whitmore v. Farley .....	17, 160
Weiner v. Gill .....	655	Whitney v. Moignard .....	128
— v. Harris .....	501, 660	Whyler v. Bingham R. D. Co. ....	259
Weiss v. Farmer .....	489	Wickens, <i>Ex p.</i> .....	720
Welch v. Royal Exchange .....	554	Wieler v. Schilizzi .....	616
Weld-Blundell v. Stephens .....	240.	Wiffen v. Bailey .....	110-11
.....	284, 286, 389	Wigan v. English & Scott, <i>h.</i> etc., <i>Insee. Co.</i> .....	574
Wellaway v. Courtier .....	315	Wightman v. Townroe .....	509
Wells v. Head .....	384	Wild v. Simpson .....	180, 188, 119
— v. Kingston-upon-Hull ..	58, 148	Wilding v. Sanderson ..	105, 117, 125-6
— v. Moody .....	334	Wilkins v. Day .....	339
— v. Smith .....	478	— v. Weaver .....	107
— v. Wells .....	125, 150	Wilkinson v. Downton ..	253, 283, 308, 450
Welsh v. L. & N. W. Ry. ....	612	— v. Evans .....	61, 64
— v. Roe .....	494	— v. Lanes & Yorks. Ry. ....	600
Wenlock (Baroness) v. River Dee Co. ....	147	— v. Lido .....	266
Wenman v. Ash .....	426	— v. Verity .....	5-5
— v. Lyon & Co. ....	706	Willesford v. Watson .....	792
Wennall v. Adney .....	322	Willetts v. Green .....	517
Wennhak v. Morgan .....	126	Williams, <i>Re</i> (1917) .....	197-8
Wentworth v. Cook .....	192	— v. Allinson .....	20
Wessex Dairies v. Smith .....	523	— v. Atlantic Assoc. Co. ....	196, 198
West of England Insee. Co. v. Isaacs .....	509	— v. Baltic, etc., Ass. Co. ....	538
West Leigh Colliery v. Tunncliffe	356	— v. Bayley .....	115
West London Bank v. Kitson ..	105	— v. Birmingham Battery Co.	528
West Yorks Agency v. Coleridge ..	215	— v. Byrne .....	515
Western Wagon Co. v. West .....	199	— v. Cardiff Corp. ....	388
Westerton, <i>Re</i> .....	194, 197-8	— v. Carwardine .....	28
Whalley v. L. & Y. Ry. ....	350	— v. Colonial Bank .....	723
Wharton v. Mackenzie .....	129	— v. Evans .....	155, 189
Whatley v. Morland .....	808	— v. Gosse .....	325
Whatman v. Pearson .....	290	— v. Hathaway .....	94
Whatmore's, Ltd. v. Stanford ..	354	— v. Holland .....	9
Wheeler v. New Merton Board Mills .....	529	— v. James .....	354, 9
— v. Whiting .....	308	— v. Jones (1845) .....	84
Wheelton v. Hardisty .....	107	— v. Jones (1865) .....	583
Whincup v. Hughes .....	51	— v. Jordan .....	59
Whistler v. Foster .....	724, 718	— v. Knight .....	113
Whitaker, <i>Re</i> .....	716	— v. Mason .....	122
Whitby v. Burt, Boulton & Har- ward .....	544	— v. Mersey Docks .....	283
White v. British Empire Insee. ..	574	— v. Midland Ry. ....	616
— v. Grand Hotel .....	359	— v. Millington .....	189
— v. Lucas .....	462	— v. Morland .....	15, 254, 518
— v. Mellin .....	252, 449	— v. North's Collieries .....	521
— v. S. E. Ry. ....	600	— v. O'Keefe .....	49
— v. Spettigue .....	249	Williamson v. Frost .....	126
— v. Stone .....	142	— v. Hine .....	460
— v. Tyndall .....	25	Willis, <i>Re</i> .....	709
		— v. Barron .....	105
		— v. De Castro .....	207

## xlvii

	PAGE
Woolfe v. Horne .....	489
Woollatt v. Stanley .....	764
Workman v. Belfast Harbour Commrs. ....	791
Worth v. Gillling .....	804
Worthington v. Curtis .....	578
Wray a. Kemp .....	494
— r. Milestone .....	77
Wren v. Holt .....	650
— v. Kirton .....	186
— v. Weild .....	448
Wright v. Annandale .....	492
— v. Child .....	366
— r. Embassy Hotel .....	592
— r. Glyn .....	451, 477
— r. Stavert .....	58
Wrightson v. McArthur .....	707
Wringe v. Cohen .....	345
Wright v. Harrison .....	355
— v. Kreglinger .....	20
Wuld v. Pickford .....	326

Xantho, The .....	620
Xenos v. Wickham .....	69, 469

Yangtze Insee. Assoc. v. Luk- manjee .....	666
Yarmouth v. France .....	538
Yates, <i>Re</i> .....	705
— v. Fruckleton .....	214
— v. Hale .....	49
Yonge v. Toynbee .....	479, 487
York Glass Co. v. Jubb .....	148
Yorke v. Yorl's Insee. Co. ....	558
York-hire Insee. Co. v. Crane ....	106
Youl v. Harbottle .....	607
Young v. Bonnier Distillery Co. .	382
— v. Grite .....	768
— v. Higson .....	99
— v. Hoffman .....	525
— v. Miller .....	797

Zagary v. Farnell .....	654
Zalutsky v. Pimand .....	791
Zarenberg v. Labouchere .....	436
Zine Corp v. Hirsch ....	146
Zitz v. S. E. Ry. ....	607





# PRINCIPLES OF THE LAW OF CONTRACTS AND TORTS

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## GENERAL INTRODUCTION

THE subject-matter of this book consists mainly of the general principles of the law of contracts and torts and some details of the rules governing particular kinds of contracts and torts.

For the present it is sufficient to say that the law of contracts is concerned with the obligations which are incurred by a person who makes a promise which is legally binding upon him, while the law of torts is concerned with the duties which are imposed by law upon everyone to refrain from unlawful interference with the rights of others or unjustifiably causing damage to others.

The law of contracts and torts is frequently described as "The Common Law", but this description is only partly accurate. It is true to this extent, namely, that the law of contracts and torts was originally settled by the Common Law Courts and administered in accordance with *legal* principles. It is, however, inaccurate in two respects. In the first place the law of contracts and torts was only a small portion of the law administered by the Common Law Courts, which were at first principally concerned with settling the Common Law of property and of crime. In the second place, since the Judicature Act, 1873, the law of contracts and torts has been governed not only by legal but also by equitable principles.

The Common Law and the Courts of Common Law by which it was settled were an outcome of the Norman Conquest and of the determination of William the Conqueror and his successors to make the royal authority supreme in all matters.

Through the diversity of its sources and the method of its administration the law of England had, before the Conquest, no national character.

The greater part was of Saxon origin, but in the east the Danes had, from the latter part of the ninth century, been in possession of Northumbria, East Anglia and the eastern half of Mercia, where for some time they retained their own legal institutions.

Moreover, even the Saxon law was not uniform. The invasions of the Saxons had resulted in the formation, by different tribes and at considerable intervals of time, of numerous independent settlements, each of which was governed by its own customs. These settlements coalesced into the kingdoms of the Heptarchy, over which Northumbria, Wessex and Mercia successively became predominant. The result was that, after the north-eastern part of England passed into the hands of the Danes, there were three main bodies of law—the Wessex law, the Mercian law and the Dane law. These, though similar in their general characteristics, differed in detail, and were everywhere modified by the old local customs, which were of great diversity.

From the reign of Alfred there is an unbroken series of laws enacted by successive Kings with the assent of the Witenagemot, the supreme Council of the Kingdom. But these laws are for the most part merely compilations of existing custom with some amendments and additions.

Local custom was fostered by the method in which the law was administered. No centralised judicial system existed and each shire and hundred had its own independent communal Court in which its freemen dispensed justice in accordance with their own practice. But where persons of the highest rank were concerned and in matters in which justice had been refused by the local Courts, a supreme and extraordinary jurisdiction was exercised by the King and Witenagemot.

Except that the Norman feudal system was applied to land held by free tenure and that the ecclesiastical courts were separated from the secular Courts, the Conquest brought about few changes in the law or its administration. All criminal jurisdiction was still exercised in the local Courts, the most important consisting principally of the Courts of the shire, now known as the county courts (a), the hundred Courts, the minor

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(a) These county courts are distinct from the modern county courts which were created by the County Courts Act 1846 and whose jurisdiction is entirely statutory.

Courts (b) and the borough Courts (c). The Witenagemot was, however, replaced by the *Curia Regis*, which was both King's Council and King's Court and exercised, by means of a permanent body of royal officials, jurisdiction over all Pleas of the Crown, i.e., all matters, whether of a criminal or civil nature, in which the King's interest was concerned.

But in the reign of Henry II the foundations of a new legal system were laid, principally by the following means:—

1. The formation of a permanent central Court, which later became the Court of Common Bench or Common Pleas, with ordinary jurisdiction in all civil disputes between subject and subject in which the King's interest was not concerned.
2. The division of the kingdom into circuits regularly visited by itinerant justices of the King's Court who sat in the county court and thus impressed the new royal law upon the old popular justice (d).
3. The regular grant to a plaintiff of the royal writ for the purpose of compelling a defendant to appear before the

(b) To a day in the previous period the practice of holding a Court independent of the hundred Court was frequently resorted to in great and small towns. In the reign of Henry II this jurisdiction became universal and the King's Court was no longer the only place where a plaintiff could obtain a writ for the purpose of compelling a defendant to appear before the Court.

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2. The division of the kingdom into circuits regularly visited by itinerant justices of the King's Court who sat in the county court and thus impressed the new royal law upon the old popular justice (*d*).
3. The regular grant to a plaintiff of the royal writ for the purpose of compelling a defendant to appear before the

(b) Towards the end of the pre-Norman period the franchise of holding a Court independent of the hundred Court was frequently vested in great land-owners. After the introduction of the feudal system this territorial jurisdiction became universal and every lord of a manor had, as incidental thereto, the right to hold a Court Baron for his free tenants and to exercise a civil jurisdiction analogous to that of the hundred Court.

(c) The boroughs also had, even before the Conquest, begun to acquire various privileges, including the right to hold a Court similar to the hundred Court. After the Conquest these privileges were, in very many cases, granted or confirmed by royal charters.

(d) The itinerant justices were an outcome of the practice, which began soon after the Norman Conquest, of sending commissioners through the country to transact royal business of various kinds. Under Henry II this practice became systematic and itinerant justices were sent out regularly, sometimes to hold a general eyre in order to inquire into all "pleas of the Crown", i.e., all Crown business, whether administrative, fiscal or judicial, but sometimes with a more limited authority. Of these limited commissions the most important was the commission of assize. This was merely a commission to take possessory assizes, which were civil proceedings for the recovery of the possession of land, and though these proceedings fell into disuse and were abolished in 1833, the modern Judges of assize still sit under a commission of assize. To this commission there subsequently became incident the jurisdiction to try civil cases commenced in the Courts of Common Pleas or King's Bench. This *nisi prius* jurisdiction was created by the Statute of Westminster II (18 Edw. 1, st. 1, c. 30), and was so called because, in cases to which the statute applied, the sheriff was directed to summon jurors to Westminster from the county in which the case originated *unless before the date specified in the writ the justices should come into that county*. The provisions of the Statute of Westminster were extended by later statutes, and it is by virtue of their *nisi prius* jurisdiction that the Judges of assize now try civil cases. In the exercise of their ordinary criminal jurisdiction the itinerant justices sat, and the Judges of assize still sit, under commissions of Oyer and Terminer and of Gaol Delivery.

King's Court and thus removing a cause from the local jurisdiction.

By these means suitors were attracted from the local Courts to the Royal Court and so the process began by which all the old laws and the new Norman law were gradually welded into one uniform body of judge-made and royal law which was of general application and became the Common Law of the Kingdom.

The local Courts were not abolished and many survive to the present day, though, with some exceptions (e), their powers are in abeyance. But, as a result of causes which it is beyond the scope of this book to discuss, they gradually sank into insignificance and most of their jurisdiction passed to the King's Courts which, by the end of the reign of Henry III, had become definitely separated from the Council and consisted of the three distinct Courts of King's Bench, Common Pleas and Exchequer.

The original functions of these three Courts were as follows: The King's Bench took cognisance of crime and all such matters as directly concerned the Crown, except matters of revenue. To the Exchequer, which soon after the Conquest existed as a department of the Curia Regis, though not as a separate Court, was appropriated the cognisance of matters of revenue; and to the Court of Common Pleas that of all civil suits between subject and subject. But by the use of fictions each of the other Courts encroached upon the province of the Common Pleas and acquired jurisdiction over all *personal* actions (f).

After the separation of the Courts from the Council, the King still continued to exercise jurisdiction in the Council. Accordingly, when the remedies given by the Courts were inadequate or could not be obtained, a practice arose of seeking relief by a petition addressed to the King in Council. On the hearing of these petitions the Council was presided over by the Chancellor, who, though originally only the chief secretary to the Council, became, in the reign of Edward I, the chief royal minister. Later it became customary to present petitions directly to the Chancellor, and by an ordinance of Edward III it was decreed that all such matters of "grace" should be determined by the Chancellor, who thus became a judicial officer possessing a power of exercising extraordinary interference without any regard to the Common Law rules. The jurisdiction of the Chancellor was much extended under Richard II, and

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(e) As, e.g., the Bristol Tolzey Court and the Liverpool Court of Passage, and, in London, the Mayor's Court and City of London Court (now united).

(f) See post, p. 7

from the Tudor period the Chancery was a distinct Court with its own procedure and rules.

The value of the Chancery process lay in the fact that it was a *Court of Conscience acting in personam*, and compelling the defendant himself to do what was just and equitable. Thus, instead of the Common Law remedy of damages, the Chancery might decree *specific performance* of a contract or grant an *injunction* to restrain a tort, and might compel obedience by the imprisonment of the defendant. So also, while the Common Law only gave damages for fraud, Equity might rescind a contract which had been induced by fraud. But, unlike the remedies of the Common Law Courts, all equitable remedies were discretionary and were not granted when the Common Law remedy was adequate or where the conduct of the plaintiff disentitled him to relief, as, *e.g.*, where he was endeavouring to enforce a contract which, though not actually illegal, was inequitable.

Both Common Law and Equity were modified and extended by statute. The term "Common Law" is therefore used to denote (i) the law declared by judgments of the Courts of Common Law (*jus non scriptum*), as distinct from statute law (*jus scriptum*); (ii) the law administered by the Common Law Courts, whether *jus scriptum* or *jus non scriptum*, as distinct from the rules of Courts of Equity. It is also used to denote the law administered by the Common Law Courts as opposed to the law administered in special Courts, as, for example, the law merchant.

The law merchant passed through three stages. In the first, which ended at the beginning of the seventeenth century, it was a special law administered by special Courts for merchants only. In the second stage, which lasted until the middle of the eighteenth century, it was recognised by the Common Law Courts as a body of customs binding only on merchants. During the third stage it has been a collection of customs incorporated into the law and binding upon all persons, whether or not merchants. And it may be extended to include new mercantile customs (*g*).

By the *Judicature Act, 1873* (*h*), the administration of law and equity was fused into one system and the jurisdiction of the Court of Chancery and the Common Law Courts was transferred

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(*g*) *Goodwin v. Roberts*, L. R. 10 Ex., at p. 352; 45 L. J. Ex. 748; *Bechuanaland Exploration Co., v. London Trading Bank*, [1898] 2 Q. B. 658; 67 L. J. Q. B. 986; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144; 71 L. J. K. B. 572.

(*h*) This Act and the subsequent Judicature Acts have been repealed (save for a few provisions) and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925 (hereinafter referred to as the Judicature Act, 1925).



to the *Supreme Court of Judicature*, consisting of (i) the *Court of Appeal*, and (ii) the *High Court of Justice*, divided into five *Divisions*, namely, the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division. But by an Order in Council of 1880 the Queen's Bench Division, the Common Pleas Division and the Exchequer Division were consolidated into the Queen's Bench (now King's Bench) Division. The distinction between law and equity was not abolished, and the difference between legal and equitable rights and remedies still exists, but law and equity are administered concurrently and every Division of the High Court must take notice of and give effect to all legal and equitable rights, estates, liabilities and defences and can give any relief which before 1878 could be given either by the Court of Chancery or the Common Law Courts (i). But in dealing with legal rights it must regard legal rules, and in dealing with equitable rights and remedies it must regard equitable rules (k).

By s. 25 (11) of the *Judicature Act*, 1873 (l), it was, however, provided that in any case in which there is any conflict between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail.

The law of contracts and torts is based upon the law governing the writs and actions which came into existence in the Courts of Common Law.

The writ by which proceedings were commenced in those Courts was in form a royal mandate, issued from the Chancery as the secretarial department of the Council, sealed by the Chancellor and addressed to the sheriff of the county in which a wrong had been committed. It contained a statement of the cause of complaint and required the sheriff to command the wrongdoer to remedy it, and, on his failure to do so, to summon him before the King's justices.

The authority of the Court was thus derived from the writ, which, since it set out the ground of complaint, defined and determined the cause of action.

(i) *Judicature Act*, 1925, ss. 36—41, re-enacting similar provisions of the *Judicature Act*, 1873. A step in this direction had already been taken by the *Common Law Procedure Act*, 1851, which gave a limited equitable jurisdiction to the Common Law Courts, see Dallen & Leake's *Pleadings* (3rd ed), p. 566.

(k) See *Scott v. Drake*, [1895] 2 Ch. 608; 61 L. J. Ch. 821; *Colls v. Home and Colonial Stores*, [1904] A. C., at p. 188; 78 L. J. Ch. 484.

(l) Re-enacted (with the addition of the words "subject to the express provisions of any other Act") by s. 41 of the *Judicature Act*, 1925.

Writs were at first few in number and adapted only to certain specific wrongs which were described in formal language.

To remedy this deficiency the Chancery adopted the practice of issuing writs *super casum*, i.e., writs which, since the complaint could not be described in the technical language of any existing writ, set out the whole of the facts which were alleged to constitute a cause of action.

This practice was temporarily checked by the Provisions of Oxford (1258), which provided that no writs should be sealed without the consent of the King in Council. It was nevertheless restored by the *Statute of Westminster II* (m), which, however, provided that such writs *super casum* should be issued only where the facts were *in consimili casu* with facts to which one of the existing writs was applicable (n).

The writs issued as a result of this Statute produced the actions known generally as actions "on the case", by means of which the greater part of the law of torts was developed.

All actions were originally classified, according to the nature of the remedy, as real, personal, or mixed. Real actions were those brought for the specific recovery of lands, tenements or hereditaments; personal actions were those brought to recover a debt or personal chattel or damages for a breach of contract or other injury; mixed actions were those in which both damages and the recovery of freehold were claimed. Real and mixed actions were abolished by the *Real Property Limitation Act*, 1888, with the exception of the action of ejectment, which was a mixed action, and three real actions; the latter, however, disappeared under the *Judicature Act*, 1878, and the action of ejectment was replaced by an action for the recovery of land, which still possesses some peculiar characteristics.

Personal actions were from the time of the Restoration divided into two classes, namely, those founded on contract and those founded on tort, but it was not until a much later period that the line between contract and tort was clearly drawn, and until modern times there remained considerable doubt as to the proper classification of certain kinds of actions (o).

(m) 13 Edw. 1, c. 24.

(n) See P. A. Landon, "The Action on the Case and the Statute of Westminster II", *Law Quarterly Review*, Jan. 1936. There is an alternative view, namely, that the action on the case originated in the Statute.

(o) See *Finlay v. Chirney*, 20 Q. B. D., at p. 503; 57 L. J. Q. B. 247; *Smolour v. Brougham*, [1914] A. C., at p. 115; 83 L. J. Ch. 465.

The personal actions that were in most common use before the Judicature Act, 1878, were the actions of Trespass, Replevin, Detinue, Debt, Covenant, Case, Trover (or Conversion), and Assumpsit.

*Trespass* was an action of *tort* which lay to recover damages for any direct and forcible interference by the defendant with the possession of the plaintiff's land or goods or any direct or forcible injury to the person of the plaintiff.

*Replevin* was an action of *tort* which lay for the recovery of specific goods which had been wrongfully distrained or otherwise unlawfully taken out of the possession of the owner. Originally it lay only for an unlawful distress, and, although it was occasionally employed as an alternative to trespass, doubts were raised as to whether this was correct (*p*).

*Detinue* was an action of *tort* which lay for the recovery of specific goods wrongfully detained from the person entitled to the possession of them and for damages for their detention.

*Debt* was an action of *contract* for the recovery of a specific sum due (i) on records, *i.e.*, judgments and certain kinds of recognisances, (ii) under a statute, (iii) under a covenant in a deed, (iv) under a simple contract, not made by deed, which had been fully performed by the plaintiff, as, *e.g.*, where a specific sum was due for goods sold and delivered.

*Covenant* was an action of *contract* which lay to recover damages for the breach of a covenant contained in a deed, other than a covenant to pay money.

*Case* (*q*) was an action of *tort* which lay for consequential damages resulting from a wrong or breach of duty on the part of the defendant.

The most common form of case was for damages resulting from a wrong analogous to a trespass. Thus, if A threw a log into a highway and, in throwing it, struck B, an action of trespass would lie because the injury was direct and immediate. If, however, B subsequently fell over the log and was injured, trespass would not lie, but, as the wrong was analogous to trespass, an action of trespass on the case lay (*r*). So also trespass would not lie for an injury to incorporeal property or to property in which the injured person had only a reversionary interest, but an action of case would lie for any such injury which was analogous to a trespass.

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(*p*) See *Mcinnie v. Blake*, 6 E. & B. 842; 25 L. J. Q. B. 399.

(*q*) See *ante*, p. 7.

(*r*) See *Scott v. Shepherd*, 2 W. Bl. 892; 3 Wilson 408.

The writ of case was not, however, applicable only to wrongs analogous to trespass; it was used to extend and supplement other writs. And it was finally settled that, if no other remedy was available, case would lie whenever a plaintiff had suffered loss or damage through the breach of any duty owed to him by the defendant, and also whenever there had been a violation of any absolute right of the plaintiff, although he had suffered no actual damage, because the law presumes damage from the violation of an absolute right (s).

In some cases also, where an act was an immediate injury and also caused consequential damage, a plaintiff might bring either trespass or case (t).

The action of case thus became of very wide application and was a most important factor in the development of the law of torts.

*Trover* (or Conversion) was a special form of case. It lay for the value of goods which the defendant had wrongfully taken, used, destroyed or otherwise dealt with in a manner inconsistent with, and intended to deny, the rights of the person entitled to their possession.

*Assumpsit* was an action of contract which lay for the recovery of damages for the breach of a promise, express or implied, not made by deed. In origin, as will be explained later, it was an action of case. But ultimately it assumed numerous forms and became the most general action of contract.

The procedure in these actions was in the highest degree technical and a mistake in any step was fatal to the party who made it, however substantial might be the merits of his case. Accordingly, until the Judicature Act, 1873, a plaintiff might fail because he had chosen the wrong form of action (u), or had failed in his pleadings to express his claim in a way that was legally accurate, although he would have succeeded if he had chosen a different form of action or used the correct language (x).

(s) See *Hammerton v. Dysart (Earl)*, [1916] A. C., at pp. 69-71; 55 I. J. Ch. 33.

(t) See Bullen & Leake's Pleadings (3rd ed.), p. 870; *Voretton v. Hardern*, 4 B. & C. 553.

(u) "The form of the action is decisive"; *Goodtitle v. North*, 2 Dougl., at p. 584, per Lord Mansfield. See also *Orton v. Butler*, 5 B. & Ald. 652; *Williams v. Holland*, 10 Bing. 112; 2 L. J. C. P. 190.

(x) See, e.g., *Bracegirdle v. Hinks*, 9 Ex. 361; 23 I. J. Ex. 120, where the plaintiff's failure was due to his claiming as a debt a sum which, technically, was damages.

Pleadings were, and still are, the means of formulating the grounds of the claim put before the Court by the plaintiff and the answer of the defendant to that claim.

They were at first made orally, in open Court, in the presence and under the superintendence of the Judges. Their object was, as it still is, to ascertain the specific points of fact or law which were affirmed by one party and denied by the other. When this result was attained the parties were said to be "at issue" (*exitum*), that is to say, at the end of their pleadings, and the questions for decision were termed the "issues".

An entry of the writ with an official minute of all the pleadings and steps in the action and of the judgment was made on a parchment roll called the "Record", which was preserved as a perpetual and conclusive testimony of the matters recorded.

In the reign of Edward III the practice of pleading orally and in open Court was superseded by that of delivering pleadings in writing, which were entered on the roll by counsel for each party alternately.

Under Edward IV the practice was again changed and the written pleadings were delivered by the pleaders to each other before entry on the Record.

When the pleadings were written, they began with the "declaration" of the plaintiff, setting out his cause of action. The declaration might contain several "counts", either based on different facts or alleging different causes of action from the same facts.

The defendant, in answer, might either demur or plead.

A demurrer was an admission that, for the purposes of the action, the facts alleged in the declaration were true but a denial that they were sufficient in their legal effect to support the plaintiff's claim. An issue of law was thus raised, which was decided by the Court.

If the defendant could not dispute the sufficiency in law of the declaration his course was to plead. Pleas were of two kinds, namely, pleas dilatory and pleas peremptory or in bar. The former merely raised some formal objection to the proceedings, the most usual kind being a plea "in abatement", by which the defendant set up some matter such as the non-joinder of a necessary party, which precluded the plaintiff from recovering upon the writ and declaration as framed. A plea in bar answered the cause of action by setting up some facts which defeated it. It might be either (i) a "traverse", i.e., a

general denial of liability or a denial of some particular allegation in the declaration; (ii) a *confession and avoidance*, by which the defendant admitted the facts alleged in the declaration but stated new facts which avoided their legal effect, as, *e.g.*, a plea of justification or excuse or a plea that the original cause of action had been discharged; (iii) a plea of *estoppel*, which will be explained later.

If the defendant pleaded, the next step was a "replication" by the plaintiff, who might, in turn, either demur or plead. In this way the pleadings continued until some definite issue of law or of fact was raised, those subsequent to the replication being termed, respectively, the "rejoinder", "surrejoinder", "rebutter" and "surrebutter".

The principal defect of this system of pleading was its formality and the complicated rules by which it was governed. For every kind of declaration, demurrer or plea there was in practice a formula from which no departure could be made. Another fault which it had was that, in certain cases, both parties might plead conclusions of law without disclosing the facts on which they relied. This was the case in certain counts termed the common *indebitatus* counts, which were used in actions for the recovery of a specific sum of money, as, *e.g.*, money lent, money due for goods sold and delivered and money received by the defendant for the use of the plaintiff. A plaintiff might, for instance, without disclosing any of the facts, simply frame his count for "money payable by the defendant to the plaintiff for money received by the defendant to the use of the plaintiff". In answer to this the defendant, likewise without disclosing any of the facts upon which he relied for his defence, might simply plead that "he never was indebted as alleged".

On the other hand it had many merits. It conduced to accuracy of thought and expression, it made clear the issues that arose for determination, and by its means the Courts gradually evolved the rules which, except in so far as altered by statute, still determined what facts a plaintiff must plead and prove to establish the cause of action which he sets up and what answers are open to a defendant.

After some important modifications by the *Uniformity of Process Act*, 1832, and the *Common Law Procedure Acts*, 1852—1860, the old system of pleading was entirely swept away by the *Judicature Acts*, 1873 and 1875, and the *Rules of Court* made under those Acts, which, in effect, abolished *forms* of actions.

An action in the High Court is now commenced either by a *writ of summons* or an *originating summons* (y). The latter is used principally in certain matters which are dealt with in the Chancery Division and in which there are no pleadings.

A writ of summons, by which proceedings are usually begun, is *served* on the defendant and commands him to "cause an appearance to be entered for him".

It must be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action (z). This indorsement may be either a *general* indorsement or a *special* indorsement.

A general indorsement merely states the nature of the claim and need not set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled. Forms of general indorsements are prescribed by the Rules and must be used, with such changes as may be necessary in the circumstances of the case.

Examples are:—

- (i) The plaintiff's claim is £300 whereof £100 is for the price of goods sold and £200 for money lent.
- (ii) The plaintiff's claim is for damages for a libel contained in the *Daily* — for Monday, January 20, 1936.

Upon service of the writ the defendant, if he intends to contest the claim, must *enter an appearance*. The plaintiff must then *deliver a Statement of Claim* in which, without specifying any particular form of action, he must set out all the material *facts* upon which he relies for his cause of action and must state specifically the relief which he requires, either simply or in the alternative (a). He may, and indeed usually must, set out the legal ground upon which he claims relief, but he must first set out the facts on which it is based. If, for instance, he is claiming money as "money received by the defendant for the use of the plaintiff", he must set out the facts by reason of which he alleges that it was received to his use. In some cases, however, the writ may be *specially indorsed* with, or accompanied by, a Statement of Claim (b).

(y) There are, however, some proceedings in the High Court which are not actions, as e.g., proceedings for divorce, which are commenced by a "petition".

(z) Rules of the Supreme Court (hereinafter referred to as R. S. C.) Order XI, r. 1.

(a) R. S. C., Order XX, r. 6. Thus, for example, the plaintiff may ask for the specific performance of a contract or alternatively (if the result shows that he is not entitled to specific performance) for damages.

(b) R. S. C., Order III, r. 6.

In answer to the Statement of Claim the defendant must *deliver a Defence*.

Demurrers, with the practice relating thereto, have been abolished, but the defendant may still raise by his Defence any point of law, as, *e.g.*, that the Statement of Claim discloses no cause of action (c). He may also, as formerly, either traverse any allegation of fact in the Statement of Claim or may set up new facts by way of confession and avoidance. And he may add to his Defence any *Counterclaim* that he has against the plaintiff, which will then be tried at the same time as the plaintiff's claim.

The plaintiff may then deliver a *Reply* and, if there is a Counterclaim, a *Defence to Counterclaim* (d). In his Reply he may, just as in a Defence, either raise an objection in point of law, or allege fresh facts by way of confession and avoidance, or simply "join issue" on the Defence, this being merely a compendious form of traversing all the material allegations in the Defence.

A Counterclaim being in effect a cross-action, a Defence to Counterclaim is governed by the same rules as a Defence to a Statement of Claim.

In some cases there may also be a Rejoinder to the Reply and a Reply to the Defence to Counterclaim, but in practice this rarely occurs.

The main rule governing all pleadings is that each party must set out all the material facts upon which he relies as constituting his case.

When the facts are ascertained it is the duty of the Court to see whether they give the plaintiff any cause of action, whatever may be its appropriate description. The plaintiff will therefore succeed if he establishes facts which, in any form of action, would have entitled him to the relief or remedy claimed (e).

Although, however, forms of action have been abolished, the effect of the Judicature Acts must not be exaggerated. Forms of pleadings are prescribed by the Rules of Court and should be followed as closely as the circumstances of the case allow. And, although a party will not fail merely because of a defect in the form of his pleading, he may incur costs through being

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(c) And in such a case the question of law may be decided before the trial of the action: R. S. C., Order XXV, r. 2.

(d) Order XXIII, rr. 1, 2.

(e) See *Oakley v. Lyster*, [1931] 1 K. B., at p. 154; 100 L. J. K. B. 177.



compelled to amend it. or he may be deprived of costs which he would otherwise have been allowed (f).

In several respects, moreover, the distinction between an action of contract and an action of tort is still of considerable practical importance (g).

And, although the old system of pleading has gone, the principles which it settled as to the conditions requisite at Common Law for the maintenance of an action still remain applicable.

Of these the most important are :—

1. That no action lies for *damnum absque injuria*, though
2. An action lies in some cases for *injuria sine damno*.

1. The mere fact that a person has suffered damage or pecuniary loss (*damnum*) does not entitle him to maintain an action unless it has been occasioned by a legal injury (*injuria*), that is to say, a violation of his legal rights. "Damage alone is not sufficient to give a cause of action; there must be some right in the person damaged to immunity from the damage complained of" (h).

2. On the other hand there may be a right of action for an *injuria* which is not accompanied by any actual *damnum*, because in some cases *damnum* is implied by law. This implication, however, occurs only where the *injuria* consists in the violation of an *absolute* right, as distinct from a qualified right.

The foregoing rules are of less importance in actions of contract than in actions of tort, because every breach of contract is a violation of the rights of the party with whom the contract was made, and is also the violation of an *absolute* right, for which an action may be brought even in the absence of any actual loss or damage (i).

In actions of tort, on the other hand, two matters have to be considered. In the first place it has to be determined whether the conduct of the defendant did in law amount to a violation of any right of the plaintiff. In the second place the nature of that right has to be ascertained. Some torts such as an ordinary trespass to land, are violations of *absolute* rights, so that *damnum* is implied and the plaintiff need not show that he has suffered any

(f) *Konsky v. B. Goodman Ltd*, [1928] 1 K B 421; 97 L J K B. 268

(g) See e.g. post p. 16, note (i)

(h) *Hampton v. Dyball (Earl)*, [1916] 1 A C at p. 81; 85 L J Ch 33. Or, as expressed in *Paul v. Williamson*, 15 C B (N S), at p. 388, "There is no such thing as a wrong without supposing a right which is violated"

(i) *Marlatt v. Williams* 1 B & Ad 115, 9 L J (O S) K B 42; 35 R R. 329. *Nicholls v. Flu Beet Sugar Factory, Ltd*, [1936] Ch., at p. 351. But a plaintiff who recovers only nominal damages may be deprived of costs.

actual damage. Others are merely violations of a *limited* or *qualified* right, in which the *injuria* consists in the unjustifiable infliction of damage, so that without damage there is no right of action (k). Thus, where land adjoins a highway, there is no absolute right to immunity from the trespasses of cattle that are being driven along the highway, but there is only a limited or qualified right to immunity from damage caused by the trespasses of the cattle through the negligence of the drover (l).

The proceedings in an action of contract or tort are usually either in the High Court or the county court, though, as has been mentioned, there are still certain local Courts with various kinds of jurisdiction.

By the Judicature Act, 1878, and an Order in Council of 1880 (m), all matters formerly within the cognisance of the Courts of Queen's Bench, Common Pleas and Exchequer were assigned to the Queen's Bench (now King's Bench) Division.

But whereas the old Common Law Courts took cognisance only of *legal* estates, rights and defences, and gave only *legal* remedies, the King's Bench Division can, and must, take notice of *equitable* estates, rights and defences, and can grant *equitable* remedies, formerly obtainable only from the Court of Chancery, as, for example, the equitable remedy of specific performance or an injunction.

But among other matters assigned to the Chancery Division are included proceedings for the rectification and cancellation of deeds and other written instruments and the specific performance of contracts for the *sale of land* and leases. And, in practice, proceedings for injunctions are commonly commenced in the Chancery Division.

The powers of the county court are entirely statutory and are exceedingly diverse.

It has jurisdiction in respect of all personal actions of contract or tort—except for libel or slander or seduction or breach of promise of marriage—where the debt or damage claimed does not exceed £200 (n). Where, however, the title to any corporeal or

(k) See *Williams v. Morland*, 2 B & C, at p 916; 2 L. J. (o.s.) K B. 191; 26 R. B. 579; *Darley Main Colliery v. Mitchell*, 11 A. C., at pp 411, 412; 55 L. J. Q. B 529, *Nicholls v. Ely Beet Sugar Factory*, [1936] Ch 348.

(l) *Tillett v. Ward*, 10 Q B D 17; 52 L. J. Q. B. 61.

(m) *Ante*, p 6.

(n) County Courts Act, 1934, s 10 Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 16 (1)

incorporeal hereditaments is in question its jurisdiction exists only where neither their value nor yearly rent exceeds £100, or, in the case of an easement or licence, neither the value nor yearly rent of the hereditaments over or in respect of which it is claimed exceeds £100 (o).

It has also equitable jurisdiction in many matters, including (i) actions for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease, of any property, where the purchase-money or, in case of a lease, the value of the property, does not exceed £500; (ii) actions for relief against fraud or mistake in which the damage sustained or the estate or fund in respect of which relief is sought does not exceed £500 in value (p).

And, in all actions within its jurisdiction, it may grant any relief or remedy which might be granted by the High Court, *c.g.*, the remedy of an injunction (q).

In these matters its jurisdiction is concurrent with that of the High Court, but a plaintiff who succeeds in the High Court upon an action which could have been brought in the county court may, according to the circumstances, either be deprived of the costs which he would otherwise have obtained from the defendant, or may only be allowed such costs as he would have obtained if he had brought the action in the county court (r).

The county court also has special jurisdiction under a very large number of statutes. And, in certain cases, an action may be remitted to the county court for trial whether or not it could have been commenced in the county court.

Except where a special procedure is prescribed by a particular statute the proceedings in the county court commence by a *plaint*. A summons is then issued and served by the bailiff of the Court upon the defendant. Except where the claim does not exceed 40s. the plaintiff must with his *plaint* file particulars of his claim, a copy of which is annexed to the summons. These *Particulars of Claim* correspond to and are framed in the same way as a Statement of Claim in the High Court, and may be followed by *Particulars of Defence* (with or without a Counterclaim) and by subsequent pleadings similar to those in the High Court.

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(o) County Courts Act, 1931, s. 51.

(p) *Id.*, s. 52.

(q) *Id.*, s. 71.

(r) See the County Courts Act, 1934, s. 47. In such a case, as well as in cases which are remitted to the county court for trial (*infra*), the Rules vary according to whether the action is one of contract or tort.

## PART I

### CONTRACTS

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#### CHAPTER I

##### THE NATURE OF A CONTRACT—THE DIFFERENT KINDS OF CONTRACTS

**SECTION 1.**—*The Nature of a Contract. The classification of Contracts. The General Conditions for the Maintenance of an Action of Contract in Modern Law.*

A *contract* comes into existence whenever a person by whom a promise is made (the *promisor*) thereby incurs towards the person to whom it is made (the *promisee*) a legal obligation to perform the promise, and the person to whom it is made acquires, as against the person making it, a legal right to require it to be performed.

A *quasi contract* is said to exist in certain classes of cases in which, under the old system of pleading, a person who claimed payment of a sum of money was allowed to maintain an action of contract upon a fictitious allegation, which could not be traversed, that the defendant had promised to pay the amount claimed.

Modern law bases all contractual rights upon a promise or agreement, but this theory was unknown to the early Common Law and was for the most part due to the development of the action of *assumpsit*.

The three principal Common Law actions of contract were, as already stated, the actions of covenant, debt and *assumpsit* (a).

There was also an action of account which lay in certain cases to compel the defendant to render an account of money received by him on behalf of the plaintiff. This action, however, fell into disuse and played little part in the growth of the law of contract. At the present day an action can always be brought for an account of money received by the defendant on behalf of the plaintiff, but, except in very simple cases, it is brought in the Chancery Division.

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Neither the action of covenant nor the action of debt was

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(a) *Ante*, p. 8.

originally based upon the breach of a promise or agreement made by the defendant.

In debt, which was the earlier, the cause of action was the detention by the defendant of a specific sum of money which was regarded as the *property* of the plaintiff and which he alleged that the defendant "*debet et detinet*" (b). The plaintiff could therefore succeed by proving that he had furnished to the defendant some *quid pro quo*, by virtue of which he claimed an equivalent sum of money. An action of debt could accordingly be brought for a liquidated sum due under an agreement which had been *executed* by the plaintiff and from which the defendant had received benefit, as, for example, a liquidated sum due for goods sold and delivered.

In covenant the cause of action was originally based upon the *grant* by deed of lands or rights, the deed being at first considered merely as conclusive *evidence* of the grant. Subsequently, however, it became a rule of *law* that all promises made by deed, including promises to pay money, were legally binding because of the *form* in which they were made.

For a long time no action lay for the mere non-performance of a promise not made by deed. This deficiency was, however, supplied by the development of the action of *assumpsit* from the action of case.

An action of case, as we have already seen (c), lay whenever damage had been caused to the plaintiff by the breach of any duty owed to him by the defendant. And whenever the defendant had undertaken to perform something for the plaintiff *and had actually commenced its performance* an action of case would lie against him for any damage caused by his *misfeasance* in the course of the performance. This was a pure action of tort, the ground on which it was based being that, because the defendant had been entrusted with and had taken in hand (*assumpsisset*) the performance of the work, a relationship was established between the parties which operated to the *detriment* of the plaintiff by exposing him to risk and therefore imposed upon the defendant a special duty rendering him liable for any damage caused by a misfeasance on his part while he was actually performing the work.

At a later period the meaning of the term "*assumpsisset*" was extended so as to include, not only the actual assumption of the performance of work, but an "*undertaking*" in the sense of a

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(b) The pleadings were in Latin from Edward III to Cromwell and from the Restoration to the beginning of the reign of George II.

(c) *Ante*, p. 8.

promise, and it was held that a similar action would lie for a *non-feasance*, i.e., when the defendant, after undertaking to do something, had altogether failed to perform his promise. In this application the action was still one of tort because, although the detriment to the plaintiff and the consequent duty of the defendant arose from the reliance of the plaintiff upon the promise, and not from the assumption of the work, the breach of promise was regarded as a tort in the nature of a fraud or deceit.

But in the sixteenth century, after some considerable conflict of opinion, it was finally settled that a *contractual* action of *assumpsit* would lie for the breach of a promise not under seal provided that it was based upon some ground, or, as it was henceforth called, "consideration", consisting either in detriment to the plaintiff, or, as in the action of debt, in benefit to the defendant. In the beginning of the next century it was also settled that a mere *promise* might be sufficient consideration and that a contract might be created by mutual promises, if both were made at the same time. In this way the action of *assumpsit* developed into an entirely distinct form of action and became an action of contract.

It lay upon all promises except those made by deed and, in the form known as *indebitatus assumpsit*, it was allowed to be brought upon an implied promise. This form of action might be used in any action upon a contract, other than a contract made by deed, where the consideration had been executed by the plaintiff and the claim was for a debt or liquidated demand in money. Thus, in an action for the price of goods sold and delivered or for money lent or work done, the plaintiff, instead of suing in debt, might sue in *indebitatus assumpsit*, alleging a debt and a promise by the defendant to pay it and a breach of that promise, such promise being implied from the debt and not requiring proof as a fact (*d*).

In this class of cases, owing to the greater advantage which its procedure gave to the plaintiff, the action of *indebitatus assumpsit* ultimately superseded the action of debt (*e*).

From cases of this character the use of *indebitatus assumpsit* was extended to cases in which the obligation of the defendant did not arise out of any contractual relationship and in which the implication of a promise was entirely fictitious (*f*).

The action of *assumpsit* thus became the mother of most of the modern law of contract and quasi contract. Even, however, when

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(d) Bullen & Leake's Pleadings (3rd. ed.), p. 35.

(e) Hence also arose the common *indebitatus* counts which have already been mentioned (*ante*, p. 11).

(f) Bullen & Leake's Pleadings (3rd ed.), pp. 47-49

it was brought for a debt, it always remained, technically, an action for damages (g). But the action of tort which was based upon deceit continued to exist for some time and was used in an action upon a breach of warranty until the latter part of the eighteenth century, after which it was gradually superseded by *assumpsit* (h).

**The modern classification of contracts.**—Although forms of action no longer exist there are still many important differences between the different kinds of contracts.

In the first place there is still, for practical purposes, a distinction between contracts resulting in a *debt* and contracts for the breach of which an action of *damages* will lie.

Other practical differences arise from the method in which a contract is formed or comes into existence.

From this point of view contracts are classified as :—

- (a) *Simple contracts, i.e.,* those made orally, or by writing not under seal, or by conduct;
- (b) *Specialty contracts, i.e.,* those made under seal (i);
- (c) *Contracts of record, i.e.,* judgments and recognisances.

They may also be classified as :—

- (a) *Express contracts, i.e.,* those whose terms were actually expressed in some written document or by words;
- (b) *Implied contracts, i.e.,* those which, in certain *kinds* of circumstances, arise by implication of *law*. An implied contract, as will be seen later, must be distinguished from a contract which, from the conduct of parties in a particular set of circumstances, it may be *inferred* that they did in *fact* make.

With reference to their performance contracts are classified as :—

- (a) *Executed, i.e.,* those in which one party has completely performed his part;
- (b) *Executory, i.e.,* those which are entirely unperformed or in which something remains to be done by both parties.

**The general conditions for the maintenance of an action of contract in modern law.**—Special rules apply to contracts of record, which are discussed at the end of this chapter. In all

(g) *Id.*, p. 36.

(h) *Steuart v. Wilkins*, Dougl. 18; *Parkinson v. Lee*, 2 East 314; *Williams v. Allinson*, *id.*, 446.

(i) Before the Limitation Act, 1939, an action for debt upon a statute was also held to be an action on a specialty, see *Gutsell v. Reeve*, [1936] 1 K. B. 272; 105 L. J. K. B. 213.

other cases the plaintiff in an action based upon an express contract is suing upon a promise alleged to have been made to him by the defendant, and for his action to succeed the following conditions must be satisfied.

1. The promise must have been made either by deed or for valuable consideration. In most cases a promise is the result of and forms part of an agreement, but a bare promise, if under seal, can also be the subject of an action of contract.

2. It must comply with any legal requirements as to its form. Most contracts are not subject to any such requirements, but some, on the other hand, must be in a particular form, *i.e.*, under seal or in writing or, as in the case of bills of exchange and cheques, in a particular kind of written instrument.

3. The promise or agreement must be concerned with legal rights and duties and intended to produce legal consequences (*k*). Accordingly agreements relating to mere social engagements such as "where two parties agree to take a walk together or where there is an offer or acceptance of hospitality . . . are not contracts, because the parties did not intend that they should be attended by legal consequences" (*l*). On this ground it has been held that the terms of a golf competition held by a club did not constitute a contract between the club and the competitors (*m*). So also, in the case of *Balfour v. Balfour* (*n*), it was held that an agreement between a husband and wife for the payment of an allowance to the wife did not create a contract in respect of which an action could be maintained, because, in the circumstances, it was intended to be merely a domestic arrangement and not a contract attended by legal consequences (*n*).

On the other hand, "in the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow" (*o*). Even such an agreement may not, however, amount to a contract if, as in the case of *Rose and Frank Co. v. Crompton, Ltd.* (*p*), the

(*k*) *Foster v. Wheeler*, 86 Ch. D., at p. 698; 57 L. J. Ch. 871.

(*l*) *Balfour v. Balfour*, [1919] 2 K. B., at pp. 578, 579.

(*m*) Unreported but referred to in *Wyatt v. Kreglinger*, [1938] 1 K. B., at p. 806.

(*n*) [1919] 2 K. B. 571; 88 L. J. K. B. 1054. It must, however, be noted that the decision in this case was merely that the particular agreement was not a contract. It was pointed out by the Court that the parties might have made a similar agreement which would have been a contract but that in fact they had not intended to do so.

(*o*) *Rose & Frank Co. v. Crompton, Ltd.*, [1923] 2 K. B., at p. 282.

(*p*) [1925] A. C. 445; 94 L. J. K. B. 120.



parties expressly stipulate that it is not to be a legal agreement or legally enforceable.

4. It must be "capable of being reduced to such certainty as to form matter of legal obligation" (q). Thus in *Guthing v. Lynn* (r) A bought a horse from B and paid £68, promising that, if the horse proved lucky, he would either pay £5 more or buy another horse. It was held that this promise was too vague to be enforced. So also an agreement to retire from a business "so far as the law allows" has been held to be too vague to be enforced (s).

But, as will be seen later, in dealing with the construction of documents, an agreement is not too uncertain to be enforced merely because some details are not actually expressed, if the Court can supply them by means of an implication of law. Thus, where no time for the performance of a contract is expressed, the Court will imply that it is to be performed within a reasonable time (t), and, where no price is expressed in a contract for the sale of goods, the Court may imply a promise to pay a reasonable price (u).

5. It must in some cases be proved by a particular kind of evidence or must comply with some particular statutory requirements.

6. It must not be induced by misrepresentation, undue influence, duress or certain kinds of mistake.

7. It must be made by a party who is legally capable of binding himself by such a promise.

8. It must not be unlawful or of a kind which is void by statute or at Common Law, as, for instance, a promise to commit a crime or gaming and wagering contracts or contracts which are contrary to public policy.

*Void, Voidable and Unenforceable Contracts.*—A promise or agreement that does not comply with the foregoing conditions may be simply a nullity, as, e.g., where it is too vague to be enforced, or it may be void, or voidable, or merely unenforceable by action.

A promise or agreement is *void* when it never has had

(q) *Guthing v. Lynn*, 2 B. & Ad. 232; 9 L. J. (o.s.) K. B. 181.

(r) *Ubi supra*.

(s) *Davies v. Davies*, 36 Ch. D. 350; 56 L. J. Ch. 962. See also *Re Vince* [1892] 2 Q. B. 478; 61 L. J. Q. B. 886, where an agreement with respect to the payment of interest on a loan was held to be too unintelligible to be enforced.

(t) *Simpson v. Hughes*, 66 L. J. Ch. 284.

(u) See *Foley v. Classique Coaches, Ltd.*, [1934] 2 K. B. 1; 103 L. J. K. B. 550.

any legal effect; it is *voidable* when it *may*, subject to certain conditions, be repudiated or rescinded, but is valid until it has been so set aside.

The difference between a void and voidable promise or agreement is of great importance so far as concerns the rights of third parties. Thus, mistake of certain kinds renders a contract *void*, but misrepresentation merely makes it *voidable* at the option of the party deceived (*x*). If, therefore, under an agreement induced by such a mistake as renders it void, A sells goods to B, who in turn sells them to C, A can recover the goods from C, because B never had any title to the goods and could therefore give no title to C (*y*). But, if the agreement was induced by a misrepresentation on the part of B, the sale is valid until the agreement is rescinded by A, who may never in fact rescind it or even want to rescind it. Accordingly, until rescission, B has a good title which he can pass to C, from whom therefore the goods cannot be recovered if, before rescission, he buys from B in good faith and without notice of the misrepresentation (*z*).

A promise or agreement may, however, although it is neither void nor voidable, be *unenforceable by action*. Thus, by the provisions of the Statute of Frauds, certain contracts are not enforceable by action in the absence of some note or memorandum thereof in writing. They are, however, neither void nor voidable and may have various legal effects. Thus, for instance, money paid under such a contract is not recoverable (*a*).

*Burden of Proof.*—In considering the foregoing conditions for the maintenance of an action it is important to remember upon whom the burden of proof lies.

The general rule is that each party must prove what he alleges. The plaintiff alleges a contract. He must therefore adduce evidence to establish the existence of a contract which is *prima facie* valid.

No burden of proof lies upon the defendant with respect to matters which he merely denies. On the other hand, it is, as a general rule, for the defendant to prove any matters invalidating a contract which is *prima facie* good, as, for instance, misrepresentation or illegality.

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(*x*) See *Oakes v. Turquand*, 11. R. 2 H. L., at p. 346; 36 L. J. Ch. 949.

(*y*) *Cundy v. Lindsay*, 3 A. C. 459; 47 L. J. Q. B. 481.

(*z*) *Id.*, and see *Phillips v. Brooks, Ltd.*, [1919] 2 K. B. 248; 88 L. J. K. B. 593.

(*a*) *Sweet v. Lee*, 3 Man. & G. 542; 60 B. R. 546.

The Court may, however, of its own motion take notice of the invalidity of an agreement and may dismiss the action.

### SECTION 2.—*Simple Contracts*

A simple or parol contract (b) is constituted by an agreement consisting of—

- (i) A promise to do or forbear from doing something;
- (ii) Made by one or some of two or more parties to the other or others of them;
- (iii) In exchange for valuable consideration given by the party or parties to whom it is made.

It may, subject to certain exceptions, be made either orally or in writing, or, even though not expressed by words or writing, it may be inferred from conduct or implied by law; in some cases also, as we have seen, a contractual obligation may arise from a quasi contract.

#### SUB-SECTION 1.—*The Parties to an Agreement*

There must be at least two parties to an agreement. One person cannot make an agreement with himself, but, by s. 82 of the *Law of Property Act, 1925*, an agreement entered into by a person with himself and one or more other persons, whether entered into before or after the commencement of the Act, is to be construed as if it had been entered into with the other person or persons alone.

Either or both parties to an agreement may consist of two or more persons, as, *e.g.*, when a contract is made between A of the one part and B and C, who are partners, of the other part. Where one party consists of two or more persons their rights and liabilities may be either *joint*, or *several*, or (in the case of liabilities only (c) ) *joint and several*.

Rights and liabilities are *joint* when one and the same promise is made to or by two or more parties collectively, as, for instance, a promise by two persons, to whom premises are let, that they will collectively be responsible for the rent. They are *several* when a separate promise to do one thing is made to or by each of two or more parties, *e.g.*, a promise by two persons that each of them will be responsible for the whole rent of premises let to both of them. They are *joint*

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(b) All contracts arising otherwise than by record or deed are parol contracts, whether oral or in writing: *Beckham v. Drake*, 9 M. & W., at p. 98; 11 L. J. Ex 201, *Caldwell v. Dobell*, L. R. 6 C. P., at pp. 492, 493; 40 L. J. C. P. 224.

(c) *Bradburn v. Botfield* 14 M. & W. 559; 14 L. J. Ex 330.

and several when separate promises are made in addition to a collective promise.

In some cases rights or liabilities can only be joint; thus the acceptors of a bill of exchange can only be liable jointly (*d*), and partners are liable jointly for the debts of the partnership (*e*).

Where no such rule of law exists a promise made by two or more persons is construed according to the natural meaning of the language used, and if they contract generally without any words indicating that each is to be separately liable their liability will be joint, but if there are any words indicating that they are to be separately liable, their liability will be either several (*i.e.*, each will be separately liable) or joint and several (*i.e.*, all will be jointly liable and also each will be separately liable). If, however, the language is ambiguous the nature of the liability will depend upon the interests of the promisors. Where, on the other hand, a promise is made to more than one person it will be construed according to their interests, unless it is incapable of being so construed (*f*).

Where a contract is *joint* there is only one contract and one cause of action for its breach. Therefore, upon the death of one, all rights (*g*) and liabilities (*h*) pass to the survivor or survivors. But all the surviving contractors must join as plaintiffs (*i*); they should also be joined as defendants, for, although each is wholly liable (*k*), yet, if one is sued separately, he has a right to have his co-contractors joined as defendants if they are alive and within the jurisdiction of the Court (*l*) and can be found by the plaintiff (*m*); but if for any reason

(*d*) Bills of Exchange Act, 1882, s. 6 (2).

(*e*) Partnership Act, 1890, s. 9.

(*f*) *Sorsbie v. Park*, 12 M. & W. 146; 13 L. J. Ex. 9; 67 R. R. 288; *Bradburne v. Botfield* (*ubi supra*); *Hopkinson v. Lee*, 6 Q. B. 984; 14 L. J. Q. B. 101; 66 R. R. 617; *Re Smith, Fleming & Co.*, 12 Ch. D. 557; 48 L. J. Bk. 115; *Palmer v. Mallett*, 36 Ch. D. 411; 57 L. J. Ch. 226; *White v. Tyndall*, 13 A. C. 263; 57 L. J. P. C. 114.

(*g*) *Martin v. Crompe*, 2 Ld. Raym. 340; *Anderson v. Martindale*, 1 East 497.

(*h*) *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Clarke v. Bickers*, 14 Sim. 639.

(*i*) See cases cited in note (*f*), *ante*. If a joint contractor refuses to join as plaintiff he must be made a defendant.

(*k*) *Richards v. Heather*, 1 B. & Ald. 29.

(*l*) *Re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; *Pulley v. Robinson*, 20 Q. B. D. 155; 57 L. J. Q. B. 54; *Wilson v. Balcarres, etc., Co.*, [1893] 1 Q. B. 422; 62 L. J. Q. B. 245.

(*m*) *Robinson v. Cusell*, [1894] 2 Q. B. 685; 64 L. J. Q. B. 52.

judgment is recovered against one or some only of them it is a bar to any further proceedings against the rest (n).

But a *several* contract creates distinct causes of action in respect of which each promisor or promisee can be sued or sue separately and the burden or benefit of which will pass to the personal representatives of anyone who dies.

A *joint and several* contract creates both a joint cause of action and also several causes of action. The promisee may either sue all the promisors jointly or he may sue each separately (o). If he sues all together he cannot subsequently sue each separately (p). But a judgment against one who is sued separately does not bar proceedings against the rest so long as any part of the claim remains unsatisfied (q).

#### SUB-SECTION 2.—*The Formation of a Simple Contract*

A simple contract may be formed in two ways, namely, either

- (i) by both parties expressing their consent to terms put before them by a third party;
- (ii) by an offer made by one party and an acceptance of that offer by the other party.

The first method of forming a contract is illustrated by the case of *The Satanita* (r).

Here A and B, who were yacht owners, entered for a club race, each signing a letter to the secretary of the club undertaking to be bound by certain rules. *Held*, that these letters constituted a contract between A and B on the terms of the rules. "The effect of their entering for the race and undertaking to be bound by these rules to the knowledge of each other is sufficient, I think, when these rules indicate a

(n) *King v. Hoare*, 13 M. & W. 494; 14 L. J. Ex. 29; *Kendall v. Hamilton*, 4 A. C. 504; 48 L. J. Q. B. 705; *Isaacs v. Salbstein*, [1916] 2 K. B. 139; 85 L. J. K. B. 1433; *Pirr v. Richardson*, [1927] 1 K. B. 448; 96 L. J. K. B. 42; *Parr v. Snell*, [1923] 1 K. B. 1; 91 L. J. K. B. 865. Where, however, all the co-contractors have been joined as defendants, a judgment obtained against one on default of appearance (R. S. C., Order XIII, rr. 4, 6), or on default in pleading (Order XXVII, rr. 3, 5), or on proceedings under Order XIV (*id.*, r. 5), does not prejudice the right of the plaintiff to continue the proceedings against the rest.

(o) Order XVI, r. 6.

(p) *Re Jeffery, ex p. Honey*, L. R. 7 Ch., at p. 183; 41 L. J. Bk. 9.

(q) *Henry v. Goldney*, 15 M. & W. 494; 15 L. J. Ex. 298; *Isaacs v. Salbstein* (*ubi supra*, at pp. 151, 152, 155); see also the other cases cited in notes (k) and (n), *ante*.

(r) *The Satanita*, *Clarke v. Dunraven*, [1897] A. C. 59; 66 L. J. Adm. 1.

liability on the part of the one to the other, to create a contractual obligation to discharge that liability" (s).

**Offer and Acceptance.**—Usually, however, a simple contract is formed by an *offer* made by one party and converted into a promise by an *acceptance* by the other party. Thus, if A writes to B, "I offer to give you £50 for your dog, Pegasus", and B writes in reply, "I accept your offer of £50 for my dog, Pegasus", B's acceptance converts A's offer into a promise and a simple contract is formed.

An offer may be made by writing or by word of mouth, or by conduct. Thus, when the owner of an automatic machine for the sale of goods puts it in a public place, he thereby offers to sell the goods which it contains at the prices indicated by the machine. So also by the mere fact of keeping an inn the innkeeper offers to take in travellers at a reasonable price; and, by the mere fact of plying for hire, a licensed taxicab driver offers to take passengers at the proper fares.

*What constitutes an offer.*—The elements of an offer are

- (i) a definite proposal communicated by one person to another; and
- (ii) an undertaking by the proposer, either express or implied, that his proposal shall be binding upon him if accepted.

There must be an offer *to be bound*, as distinct from a statement which merely expresses an intention or invites negotiations or gives information (t).

Thus, in *Montreal Gas Co. v. Vasey* (u) it was held that a mere promise "to favourably consider an application" for the renewal of a contract was not an offer capable of creating a contractual obligation.

So also, in *Harris v. Nickerson* (x), where an auctioneer advertised a sale of property, "the highest bidder to be the buyer", but some of the lots were withdrawn without notice, it was held that the advertisement was a mere declaration of intention and not an offer to persons who might attend the sale that all the lots should be put up for sale. But where a sale is advertised as *without reserve* and a lot is put up, there is an undertaking by the auctioneer and the vendor that the sale shall be without

(s) [1897] A. C., at p. 63.

(t) See *Farina v. Fickus*, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; *Price v. Rhondda U. D. C.*, [1923] 2 Ch. 372; 93 L. J. Ch. 1.

(u) [1900] A. C. 595; 69 L. J. P. C. 184.

(x) L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

reserve, and accordingly there is a contract with the highest bidder that he shall be the purchaser (y).

Again, in *Spencer v. Harding*, where the defendants issued a circular saying that they were "instructed to offer to the wholesale trade for sale by tender" certain stock-in-trade, it was held that those words did not amount to a promise to sell to the highest bidder, but was a mere intimation that the defendants were willing to receive offers (z).

But the mere quotation of a price in answer to an inquiry is not an offer. Thus, in *Harvey v. Facey* (a), A sent to B the following telegram about property with respect to which they had been negotiating: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". B telegraphed the reply: "Lowest price for Bumper Hall Pen, £900". A telegraphed back: "We agree to buy Bumper Hall Pen for £900 asked by you". Held, that B's telegram answered only the second question of A. There was no offer to sell at £900, but merely a statement of the lowest price. The second telegram from A was not therefore an acceptance but an offer.

Similarly when a tradesman sends out a price list, it is not an offer to supply an unlimited quantity of the goods at the prices named, and the giving of an order for the supply of goods named in the list does not of itself create a contract. Until something which amounts to an acceptance is done by the person receiving the order, there is no contract (b).

But where a tender is given to supply goods at certain fixed prices in such quantities as may be desired from time to time and is accepted by the party to whom it is given, each order for such goods is an acceptance of a continuing offer made by the person tendering and creates a contract (c).

An offer need not be addressed to a definite person; it may be made to the world at large. Accordingly an advertisement offering a reward for some act or information is a promise to pay the reward to any person who shall do the act or give the information which is required (d).

So, in the case of *Carlill v. Carbolic Smoke Ball Co.* (e), the defendants published an advertisement offering £100 reward to

(y) *Id.*, at p. 289; *Warlow v. Harrison*, 1 E. & E., at p. 316; 29 L. J. Q. B. 14; *Johnston v. Boyes*, [1899] 2 Ch. 73; 68 L. J. Ch. 425. This contract is, however, distinct from the actual contract of sale [1899] 2 Ch., at p. 87, in which the bid is the offer (1 E. & E., at pp. 307, 317).

(z) L. R. 5 C. P., at p. 561; 39 L. J. C. P. 332. But if the circular had said "And we undertake to sell to the highest bidder" there would have been a contract with the highest bidder: *id.*, at p. 563.

(a) [1893] A. C. 552; 62 L. J. P. C. 127. See also *Boyers v. Duke*, [1905] 2 Ir. R. 617.

(b) *Granger & Son v. Gough*, [1896] A. C., at pp. 333, 334; 65 L. J. Q. B. 410.

(c) *Gl. Northern Ry. v. Witham*, L. R. 9 C. P. 16; 43 L. J. C. P. 1.

(d) *Williams v. Carwardine*, 1 B. & Ad., at p. 623; 2 L. J. K. B. 101; 38 R. R. 328.

(e) [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

anyone who should contract influenza after having used one of their smoke balls in accordance with certain prescribed conditions, and stating that they had deposited £1,000 with a bank to show their sincerity. A lady, having read the advertisement, bought a smoke ball and used it in compliance with the directions, but nevertheless contracted influenza. It was argued (*inter alia*) that there was no offer, but a mere statement of intention, and secondly, that, even if there was an offer, it could not become binding, because it was not made to any particular person. It was held, upon the language of the advertisement, that there was a definite and express offer, and, in the second place, that it was an offer made to anybody who performed the conditions named in the advertisement, and that there was therefore a contract with anyone who accepted the offer by performing the conditions.

But although the offer need not be made to a definite person, it cannot be accepted by a person to whom it was not in fact communicated. Accordingly, when a general offer is made to the public, or a reward is offered to any person giving information, there is no contract with a person who, without knowledge of the offer, fulfils its conditions or supplies the information (f).

Moreover a person who accepts an offer is bound only by the terms communicated to him. In some cases, however, communication may be implied by law or inferred as a matter of fact.

The question whether an offer has been communicated to a person who is alleged to have accepted it has often arisen in connection with conditions which are printed or written upon, or to which reference is made by, tickets, receipts and other documents which in the course of a contract are delivered by one party to another.

Such documents are of three classes, with regard to which the following rules were laid down in the year 1877 in *Parker v. South Eastern Ry.* (g) and have since been affirmed and explained in numerous cases (h).

A fundamental distinction exists between documents which are signed by a party to a contract and those which are not signed but are delivered to one party with the intent of indicating the offer made by the party delivering them.

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(f) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B., at p. 489, note (2); 61 L. J. Q. B. 696.

(g) 2 C. P. D. 416; 46 L. J. C. P. 768.

(h) See in particular *Watkins v. Rymall*, 10 Q. B. D. 178; 52 L. J. Q. B. 121; *Roe v. Naylor, Ltd.*, [1917] 1 K. B. 712; 86 L. J. K. B. 771; *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K. B. 394; 103 L. J. K. B. 730.



Where a document which contains the terms of a contract is signed by one of the parties he is bound by those terms and, in the absence of any misrepresentation by the other party, it is immaterial that he has not read the document and does not know its terms (i).

Where a document which contains terms or conditions limiting or qualifying the offer of one party is handed or delivered by him to the other party, a further distinction must be drawn between documents which ordinarily are mere receipts or vouchers not containing or referring to any contractual terms and those which usually do contain special terms or conditions (k).

A. Where the document is one which does not ordinarily contain any special terms the burden is on the party delivering it to show that he intended that it should contain the terms of the contract and that the other party, when he received it, *knew or had reasonable notice* of this, and either assented or did not object (l). If the recipient did not know that there was writing or printing on the document, he is not bound by the conditions; if he knew that there was writing or printing, and knew or believed that it contained conditions, he is bound; and, even if he did not know or believe that it contained conditions, he is bound if he had reasonable notice that it contained conditions (m). Whether or not reasonable notice was given is a question of fact "in answering which it is necessary to look at all the circumstances of the case and the situation of the parties" (n).

Thus, in *Parker v. South Eastern Ry.* (o), the plaintiff left a bag in a cloakroom belonging to a railway company. On the front of the ticket which he received for the bag there was printed "See back"; on the back there were special conditions limiting the liability of the company. The plaintiff swore that he never read the ticket and believed that it was a mere receipt. *It was not proved or even suggested by the company that any general practice existed of issuing cloakroom tickets containing conditions intended to vary the ordinary contract of bailment which arose from the deposit of articles.* Held, that the plaintiff was not bound by the

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(i) *Parker v. South Eastern Ry.*, 2 C. P. D., at p. 421; *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K. B., at p. 102.

(k) *Parker v. South Eastern Ry.*, 2 C. P. D., at p. 423.

(l) *Parker v. South Eastern Ry.* (*ubi supra*); *Roe v. Naylor*, [1917] 1 K. R. 712; 86 L. J. K. B. 771.

(m) 2 C. P. D., at p. 423; *Richardson, Spence & Co. v. Rowntree*, [1894] A. C. 216; 63 L. J. Q. B. 233.

(n) *Hood v. Anchor Line, Ltd.*, [1918] A. C., at p. 844.

(o) *Ubi supra*.

conditions unless he knew of them or, in the opinion of the jury, had reasonable notice of them.

From the date of this case it has been settled that, *in similar cases*, the proper questions for the jury are: (i) Did the plaintiff (or recipient) know that there was writing or printing on the ticket? [If so, then] (ii) Did he know or believe that the writing or printing contained conditions? [If not, then] (iii) Did the defendant (or person delivering the ticket) do what was reasonably sufficient to give him notice of the condition? See *Richardson v. Rowntree & Co.*, *ubi supra*. It must, however, be remembered that *Parker's Case* was decided in 1877 and that since that date the practice of printing conditions on tickets has become very general and well known, so that cases which would formerly have fallen within this class may now fall within the next class. So, in the case of *Chapelton v. Barry Urban District Council* (p), a distinction was drawn between "railway tickets; cloakroom tickets or documents issued by bailees when they take charge of goods" and a ticket for the hire of a deck chair on a beach containing on its face merely a receipt for the amount paid for the use of the chair for a specified time and nothing to call attention to special conditions printed on its back, which, accordingly, formed no part of the contract for the hire of the chair.

B. But where the document is one which ordinarily contains special terms, such as a sold note (q), or a ticket for an ocean voyage, which usually contains terms and conditions as to cabins, luggage, etc. (r), or is one which usually refers to and incorporates special terms, as in the case of an excursion railway ticket, and the party to whom it is handed or delivered either assents or receives it without dissent, he is *prima facie* deemed to know and is bound by its contents although he has not read them, and does not in fact know that the document contains any special terms (s). The operation of this rule is illustrated by the following cases:—

In *Watkins v. Rymill* (t) the defendant kept a repository for the sale on commission of horses and carriages. The plaintiff left with him a wagonette for sale and was given a receipt containing the words, "Received . . . subject to the conditions exhibited on the

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(p) [1940] 1 K. B. 532; 109 L. J. K. B. 213.

(q) See *Roe v. Naylor, Ltd.* (*ubi supra*).

(r) *Hood v. Anchor Line, Ltd.*, [1918] A. C. 837; 87 L. J. P. C. 156.

(s) *Parker v. South Eastern Ry.*, 2 C. P. D., at p. 424.

(t) 10 Q. B. D. 178; 52 L. J. Q. B. 121.

premises". He put the receipt into his pocket without looking at it. *Held*, that he was bound by the conditions as he must have well known that some special conditions would be attached to the receipt of a carriage on sale by commission.

In *Thompson v. L. M. & S. Ry.* (u) the plaintiff, who was unable to read, had an excursion ticket taken for her by her daughter. The ticket was available only on special trains, running on special days and at special fares. On its face was "Excursion. For conditions see back". On its back was "Issued subject to the conditions and regulations in the Company's time-tables and notices and excursion and other bills". The excursion bills also referred to the time-tables, in which there was a condition limiting the liability of the railway company. Before the ticket was taken the plaintiff's father had, on her behalf, made inquiries about the excursion train. *Held*, that she could not allege ignorance of the condition and that the question of reasonable notice ought not to have been left to the jury. It was a special contract made for a special transit by an excursion train at a special price, and everyone knows that conditions are imposed on persons taking such tickets.

In either of the last two cases, however, the question may arise whether a particular term or condition was assented to. Here the question, which is one of fact, is whether the document was in such a form that a reasonable man reading the document with reasonable care might and did fail to see that the particular clause formed part of the contractual terms, as for example, where he was misled by any ambiguity in the writing, or by the condition being placed in a part of the document in which a man of ordinary care and intelligence would not expect to find it, or if it was printed in such small and illegible type as to be unreadable by a person of ordinary eyesight (x).

In either case, also, a condition may not be binding because it is not merely unreasonable but so extravagant as to raise the inference that assent to it was obtained by fraud or so irrelevant as to be foreign to the contract (y).

An offer when once made is deemed to be continuous and to remain open for acceptance until it is revoked or lapses.

*Revocation of offer.*—Until it is accepted an offer has no binding effect and may be revoked by the party making it, even

(u) [1930] 1 K. B. 41; 98 L. J. K. B. 615.

(x) *Roe v. Naylor*, [1917] 1 K. B. 712; 86 L. J. K. B. 771. See also *Stephen v. International Sleeping Car Co.*, 19 T. L. R. 621 (where an important condition was placed in the middle of a number of advertisements).

(y) *Parker v. South Eastern Ry.*, 2 C. P. D. 416; 46 L. J. C. P. 768; *Gibaud v. Great Eastern Ry.*, [1920] 3 K. B. 689.

though he expressly gives the person to whom it is made a certain time within which to accept or reject it.

Thus, in *Routledge v. Grant*, where A offered to purchase a house and to give B six weeks for a definite answer, it was held that A might, even within the six weeks, retract his offer if it had not yet been accepted by B (z).

This rule, however, does not apply to options which are given for valuable consideration and created by a preliminary contract which is in itself complete, as, e.g., where A pays B £100 for a three months' option on a house, that is to say, for the right to buy the house at a certain price at any time within three months. In such a case there is an offer by B which is irrevocable during the continuance of the option.

Revocation has no effect until it has been communicated to the party to whom the offer was made.

Thus, in *Stevenson v. Maclean* (a), A offered iron to B on certain terms and stated that he would keep the offer open until the following Monday. On the Monday morning at 9.42 a.m. B wired to A asking whether the terms could be modified. A did not reply to the wire and after its receipt sold the iron and at 1.25 p.m. wired to B that he had done so. At 1.34, and before the receipt of A's wire, B wired an acceptance of the original offer. Held, that A's wire did not amount to a revocation of his offer until it was received and that his original offer was still open when accepted by B.

But it is not always necessary that there should be an express communication or that it should be communicated by the party making the offer; it may be sufficient if the other party has, from any source, knowledge of facts inconsistent with the continuance of the offer.

Thus, in *Dickinson v. Dodds* (b) A offered to sell a house to B and to leave the offer open for a certain time, but, before the expiration of that time and before any acceptance by B, sold to C. B. knowing of the sale, accepted within the time fixed. It was held that there was no contract, for B could not accept after he knew that A had done an act which rendered impossible the performance of the offer.

*Lapse of offer.*—Even if there is no express revocation an offer may lapse—

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(z) 62 L. J. C. P. 166; 29 R. R. 672; 4 Bing. 658.

(a) 5 Q. B. D. 856; 49 L. J. Q. B. 701. See also *Byrne v. Van Tienhoven & Co.*, 5 C. P. D. 844; 49 L. J. C. P. 316.

(b) *Infra*. See also *Cartwright v. Hoogstael*, 105 L. T. 628.

1. By the death of the party by whom (c) or to whom the offer is made (d).
2. By non-acceptance within the time fixed by an offeror (e) or within a reasonable time (f). Where an offer is by telegram it may be inferred that acceptance by telegram is required, and an acceptance by letter may not be within a reasonable time (g).
8. By its refusal or a counter-offer by the party to whom it is made (h).

*Acceptance.*—By acceptance the offer is converted into a promise. Like the offer an acceptance may be by writing or words or by an act, and it may be inferred or implied from conduct.

An acceptance must be made in accordance with any conditions imposed by the offer; therefore, as already stated, where the offer is open only for a fixed time the acceptance must be within that time. But if the acceptance is delayed by the fault of the offeror, it may be valid though made after the time fixed.

Thus, in *Adams v. Lindsell* (i), A by letter offered to sell goods to B, receiving an answer by return of post, but misdirected the letter, so that it was received two days late by B, who immediately posted his answer. It was held that, since the delay was caused by the fault of A, the answer of B must be taken to have been received by return of post.

And, even though the time for acceptance has elapsed, an agreement either to enlarge the time for acceptance or to treat a late acceptance as a proper acceptance may be inferred from the conduct of the other party and the circumstances of the case (k).

Though, however, the party making the offer may fix conditions for its acceptance, he cannot impose upon the other party an obligation to communicate his *refusal*.

Thus, in *Felthouse v. Bindley*, A wrote to B making an offer for a horse, and saying: "If I hear no more about him, I consider the

(c) *Dickinson v. Dodds*, 2 Ch. D. 463, at p. 475; 45 L. J. Ch. 777.

(d) See *Bagel v. Miller*, [1908] 2 K. B. 212; 72 L. J. K. B. 495. See also *Reynolds v. Atherion*, [1921] W. N. 174; 127 L. T. 189; *Kennedy v. Thomas sen*, [1929] 1 Ch. 426; 98 L. J. Ch. 98.

(e) *Tinn v. Hoffmann*, 29 L. T. 271.

(f) *Ramsgate Hotel Co. v. Montefiore*, L. R. 1 Ex. 109; 85 L. J. Ex. 90.

(g) *Quenerduaine v. Cole*, 82 W. R. 185.

(h) See *post*, p. 36.

(i) 1 B. & Ald 681; 19 R. R. 415.

(k) *Morrell v. Studd and Millington*, [1918] 2 Ch., at p. 658; 88 L. J. Ch.

horse mine at £30 15s." It was held that A had no right to impose on B a sale of the horse unless he chose to comply with the condition of writing to refuse the offer (l).

*Communication of acceptance.*—An acceptance of an offer must be communicated by the party to whom it is made or his agent to the party making it or his agent.

Thus, in *Powell v. Lee* (m), A applied for the headmastership of a school, and the committee of selection passed a resolution to appoint him. One of the committee informed A of this resolution, not having any authority to do so. It was held that there was no contract, because there was no communication to A by the committee.

So also in *Hebb's Case* (n) where A applied for shares in a company and the shares were allotted to him by the directors, who communicated the fact of the allotment to their own agent and not to A, it was held that there had been no communication to A so as to prevent him from withdrawing his offer.

But "as notification of acceptance is required for the benefit of the person making the offer, [he] may dispense with notice to himself if he thinks it desirable to do so, and . . . where a person, in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is sufficient acceptance without notification" (o). So, where a person advertises a reward for the doing of an act, such as the return of a lost dog, it follows "as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with" (p). Accordingly, in the case of *Carlill v. Carbolic Smoke Ball Co.* (q) it was held that the performance by the plaintiff of the conditions of the

(l) 11 C. B. (N.S.) 868; 31 L. J. C. P. 204.

(m) 99 L. T. 284.

(n) L. R. 4 Eq. 9; 36 L. J. Ch 748.

(o) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B., at p. 269; 62 L. J. Q. B. 257.

(p) *Id.*, at p. 270.

(q) *Ante*, p. 28.

advertisement was a sufficient acceptance without any notification to the defendants.

**Counter-offers.**—The making of a counter-offer puts an end to the original offer, which cannot afterwards be accepted.

Thus, in *Hyde v. Wrench* (r), the defendant offered to sell property to the plaintiff for £1,000. The plaintiff by his agent wrote offering £950, which the defendant refused to accept. The plaintiff's agent then wrote agreeing to pay the £1,000 originally asked. *Held*, that there was no contract. The counter-offer of £950 was a rejection of the original offer which could not subsequently be revived.

But an offer is not rejected merely by an inquiry whether the offeror is willing to modify the terms of his offer (s), or as to the wishes of the offeror with regard to some matter which is not one of the terms of the contract.

Thus, in *Simpson v. Hughes* (t), there was a complete acceptance by A of B's offer to sell land, no time for completion being stated in the offer. A's letter of acceptance inquired from what time B wished the purchase to date. *Held*, that this inquiry did not prevent his acceptance from being complete. Where no time is fixed for completion, the law implies that it must be within a reasonable time.

**Postal communications.**—"Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is *posted*" (u). And this rule applies, even though the acceptance is lost in the post and never reaches its destination (x).

It must be particularly noticed that this rule is the opposite of that applying to notice of revocation, which is not complete

(r) 3 Beav. 384.

(s) *Stevenson v. Maclean*, 5 Q. B. D. 346. See *ante*, p. 83.

(t) 66 L. J. Ch. 231.

(u) *Henthorn v. Fraser*, [1892] 2 Ch., at p. 33; 61 L. J. Ch. 373. Or as expressed by Kay, L.J., "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post": [1892] 2 Ch., at p. 36. See also *Dunlop v. Higgins*, 1 H. L. C. 381; 73 R. R. 98; *Harris's Case*, L. R. 7 Ch. 587; 41 L. J. Ch. 251.

(x) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; 48 L. J. Ex. 557. But delivery of a letter to a town postman, who by the rules of the Post Office is forbidden to take charge of letters for the post, is not equivalent to posting the letter: *Re London and Northern Bank, ex p. Jones*, [1900] 1 Ch. 220; 69 L. J. Ch. 21.

until received (y). Both rules are illustrated by the case of *Henthorn v. Fraser* (z).

In this case H, who lived at Birkenhead, called on July 7 at the office of the defendant in Liverpool, and received from the defendant's secretary a written offer to sell some houses for £750. On July 8, between 12 and 1 o'clock, the secretary wrote to H, withdrawing his offer, and his letter reached Birkenhead at about 5.30 p.m. on the same day. In the meantime, however, H had, at 3.50 p.m. on July 8, posted a letter of acceptance, which reached the secretary on July 9. It was held (i) that, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post (a); (ii) that the acceptance by H was, therefore, complete as soon as it was posted; (iii) that the revocation of an offer is ineffectual until it is brought to the knowledge of the party to whom it is made (b), and that the secretary's letter withdrawing his offer was, therefore, too late to affect the acceptance.

*Acceptance must show a complete and unqualified consensus ad idem between the parties.*—This rule may be illustrated by the following examples:—

- i. A wrote to B referring to a previous conversation and expressing his willingness to enter the service of B on certain terms then discussed, one of which was that a list of customers was to be made out upon whom A was to call and upon whose orders he was to have a commission. B replied that A's letter embodied the substance of the terms agreed upon and added in a postscript, "I have made a list of customers which we can consider together". It was held that these letters did not constitute a complete contract. "*If the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not ad idem*" (c).
- ii. A agreed to buy a motor van from B "on the understanding that the balance of purchase money can be had on hire-purchase terms over a period of two years". Held, that there was no concluded contract between A and B because a hire-purchase agreement can be effected "in various ways and by documents containing a multiplicity of different terms" (d). The parties had not got beyond an understanding to agree on hire-purchase terms; "they never

(y) *Ante*, p. 88.

(z) [1892] 2 Ch. 27; 61 L. J. Ch. 87.

(a) On this point the judgment extended the cases of *Dunlop v. Higgins*, 73 R. R. 98; 1 H. L. C. 381; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; 49 L. J. C. P. 316; and *Harris's Case*, L. R. 7 Ch. 587; 41 L. J. Ch. 261, where the offer was by post.

(b) Following *Byrne v. Van Tienhoven* (*ubi supra*).

(c) *Appleby v. Johnson*, L. R. 9 C. P. 158; 48 L. J. C. P. 146. See also *Stanley v. Dowdeswell*, L. R. 10 C. P. 102.

(d) *Scammell & Nephew Ltd. v. Ouston*. [1941] A. C. 251; 110 T. J. K. R. 197



went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be "(e).

- iii. A wrote to B offering to purchase property for £1,450. B's solicitor replied accepting his offer, but adding, "We enclose contract for your signature". The contract contained special terms not mentioned in the offer. It was held that the letters showed merely an agreement as to the price, and that the letter of B's solicitor amounted to a counter-offer (f).
- iv. A offered to purchase a house on certain terms, "possession to be given on or before July 25". B wrote accepting the offer and saying that he would give possession on August 1. *Held*, that there was no acceptance (g).
- v. A wrote to B offering for sale "good" barley. B wrote accepting, but stated that he expected "fine" barley. The jury having found that there was a distinction in the corn trade between good barley and fine barley, it was held that there was no acceptance (h).
- vi. An agent accepts an offer subject to ratification by his principal. Until such ratification there is no contract or contractual relationship and the offer may be withdrawn at any time before ratification (i).
- vii. A accepted an order for goods "subject to war clause". *Held* that, as there were at the date of the acceptance many war clauses, there was no *consensus ad idem* and no contract (j).

Acceptance of a *tender* may or may not create a contract according to the circumstances of the case and the terms of the tender and acceptance. There are three main classes of cases (k).

A may tender to do specific work or supply a specific quantity of materials at a fixed sum. Here the acceptance of the tender creates a contract.

A may tender to supply goods at certain prices in such quantities as may be ordered from time to time. Here the mere acceptance of the tender does not create any obligation to order the goods, though each order creates a contract so long as the tender remains unrevoked (l).

(e) [1911] A. C., at p. 269.

(f) *Jones v. Daniel*, [1894] 2 Ch. 392; 63 L. J. Ch. 562. See also *Crossley v. Maycock*, 11 R. 18 Eq. 180; 43 L. J. Ch. 379.

(g) *Routledge v. Grant*, 4 Bing. 658; 6 L. J. C. P. 166; 29 R. R. 672.

(h) *Hutchinson v. Bourke*, 5 M. & W. 535; 9 L. J. Ex. 24. See also *Jordan v. Norton*, 4 M. & W. 155; 7 L. J. Ex. 281; 51 R. R. 508.

(i) *Watson v. Davies*, [1931] 1 Ch. 455; 100 L. J. Ch. 87.

(j) *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading Co.*, [1944] 1 K. B. 12; 113 L. J. K. B. 26.

(k) *Percival, Ltd. v. L.C.C. Asylums, etc., Committee*, 87 L. J. K. B. 677.

(l) *Great Northern Ry. v. Witham*, *ante*, p. 28, and see *R. v. Demers*, [1900] A. C. 103; 69 L. J. P. C. 5.

A may tender to supply to B for a certain period at fixed prices all goods of a certain kind that B may require during that period. Here the mere acceptance of the tender does not bind B to order any of the goods, but it does bind him to order from A such of the goods as he may require during the period and does not justify him in treating the tender as a mere price list (m).

An acceptance may be conditional, but in such a case there is as a rule no contract until the condition is fulfilled; an acceptor may, however, waive a condition that is for his sole benefit.

Thus, in *Morrell v. Studd and Millington* (n), a vendor of property accepted the price offered by the purchaser, subject to the purchase money being secured to his satisfaction. Held, that as this condition was for the benefit of the vendor alone, it could be waived by him.

On the other hand, in *Lloyd v. Nowell* (o), where a vendor signed a memorandum of a contract for the sale of a house "subject to the preparation by the vendor's solicitor and completion of a formal contract", it was held that this stipulation could not be waived by the vendor because it was not for his sole benefit.

*Reference to a formal contract.*—Difficulties sometimes arise where parties in the course of negotiations have expressed an intention that their agreement shall be embodied in a formal contract. On this point the following rules have been laid down:—

The parties to a contract may always reserve the right not to be bound except by a formal contract. Where, in the course of negotiations, reference has been made to the execution of a formal contract the question in each case is whether, *having made a binding contract*, the parties agreed merely that its terms shall be reduced to formal shape or whether they agreed that there should be no binding contract *until* the execution of a formal contract. If there was a complete agreement to which no new terms could be added, it is none the less binding merely because the parties agreed that it should be more formally expressed. But if there was an agreement subject to a provision for the execution of a formal contract then that provision is a condition of the bargain and until it is fulfilled there is no binding contract (p).

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(m) *Ford v. Newth*, [1901] 1 K. B. 688; 70 L. J. K. B. 459.

(n) [1913] 2 Ch. 648; 83 L. J. Ch. 114.

(o) [1895] 2 Ch. 744; 64 L. J. Ch. 744.

(p) *Chinnock v. Marchioness of Ely*, 4 D. J. & S. 688; 146 R. R. 495; *Winn v. Bull*, 7 Ch. D. 29; 47 L. J. Ch. 139; *Rossiter v. Miller*, 8 A. C. 1124; 48 L. J. Ch. 10; *Rossdale v. Denny*, [1921] 1 Ch. 57; 90 L. J. Ch. 204.

Thus there is no binding contract where there is an acceptance "subject to a formal contract" (q), or "subject to contract" (r), or "subject to the terms of a formal agreement to be prepared" (s), or "subject to the terms of a lease" (t).

But where A offers to buy a house for £350 and to "sign contract on auction particulars" and B accepts "subject to contract as agreed", there is a complete acceptance (u). Where, however, an agreement contained a clause: "This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herein stated, is signed", it was held that the agreement remained effective until the fully signed agreement was drawn up and signed (w).

*Contracts by correspondence.*—Where a contract is contained in letters the whole correspondence must be looked at. If there is a definite offer, and it is accepted without qualification, and the letters of offer and acceptance cover all the terms of the contract which were then under negotiation, the complete contract thus arrived at cannot be affected by negotiations in subsequent letters unless they amount to a new contract or an agreement for rescission (x).

But, on looking at the whole correspondence, it may appear that the offer and acceptance did not contain all the terms under negotiation, for earlier letters may show that there were other terms under negotiation, and letters subsequent to those which at first sight contain a complete offer and acceptance may show that those terms were still under negotiation (y).

(q) *Rossdale v. Denny* (ubi supra); *Lloyd v. Nowell* (ubi supra).

(r) "Where a person accepts an offer 'subject to contract', it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged": *Keppel v. Wheeler*, [1927] 1 K. B., at p. 584; 96 L. J. K. B. 438. *Eccles v. Bryant*, [1948] Ch. 93; [1948] L. J. R. 418.

(s) *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.* [1942] 2 K. B. 32; 111 L. J. K. B. 569.

(t) *Raingold v. Bromley*, [1931] 2 Ch. 307; 100 L. J. Ch. 337. This expression means "subject to the terms to be contained in a lease executed by the lessor" and until the lease is executed there is no binding agreement. Even if it meant "subject to an agreement being come to between the parties as to the terms to be contained in a lease to be executed", it would still be unenforceable, as being merely an agreement to make a second agreement the terms of which were not yet agreed: [1931] 2 Ch., at p. 316, and see *Chillingworth v. Esche*, [1924] 1 Ch., at p. 114; 93 L. J. Ch. 129.

(u) *Filby v. Hounsell*, [1896] 2 Ch. 737; 65 L. J. Ch. 852.

(w) *Branca v. Cobario*, [1947] K. B. 854; 63 T. L. R. 408.

(x) *Perry v. Suffields, Ltd.*, [1916] 2 Ch. 187; 85 L. J. Ch. 460; approving the statement of the law by North, J., in *Bellamy v. Debenham*, 45 Ch. D. 481; 60 L. J. Ch. 166; and his criticisms upon observations of Kay, J., in *Bristol, etc., A. B. Co. v. Maggs*, 41 Ch. D. 616; 59 L. J. Ch. 472.

(y) *Hussey v. Horne Payne*, 4 A. C. 311; 48 L. J. Ch. 846.

SUB-SECTION 8.—*Consideration.*

The term "consideration" was originally used in a general sense as indicating the ground or cause upon which an action was based. Ultimately, however, it became limited to the particular ground on which the contractual action of *assumpsit* was based (z). In this sense it has been defined as "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" (a).

It has for many years been settled law that consideration is necessary for every simple contract, even though it is in writing. There is accordingly no intermediate class of contracts between specialty contracts and simple contracts; "if [contracts] be merely written and not specialties, they are parol and consideration must be proved" (b). Where, however, a promise has been made which is intended to create legal relations and which to the knowledge of the promisor was intended to be acted upon and was acted upon by the promisee, the Court will not allow the promisor to act inconsistently with it, even though the promise was not supported by consideration (c).

In some respects, moreover, the rules as to consideration do not apply to negotiable instruments, which are governed by principles of the law merchant that existed before the doctrine of consideration had developed. Thus, a party to a bill of exchange or promissory note may be liable on the instrument, although he has received no consideration and the plaintiff has given none.

The origin of the doctrine of consideration, and its basis on either benefit to the promisor or detriment to the promisee, has already been considered. This double aspect of consideration is illustrated by the case of *Carlill v. Carbolic Smoke Ball Co.* (d), in which it was argued that there was no consideration for the promise of the defendants. But it was held that there were two answers to this argument. "It is quite obvious that, in the view of the advertisers, a use by the public of their remedy . . . will react and produce a sale which is directly beneficial to them. Therefore the advertisers get out of the use an *advantage* which

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(z) See *Thomas v. Thomas*, 2 Q. B. 851; 11 L. J. Q. B. 104.

(a) *Currie v. Misa*, L. R. 10 Ex., at p. 162; 44 L. J. Ex. 94.

(b) *Rann v. Hughes*, 7 T. R. 350, n.; 53 R. R. 262.

(c) *Central London Property Trust, Ltd. v. Hightrees House, Ltd.*, [1947] 1 K. B. 130; [1947] L. J. R. 77.

(d) *Ante*, p. 28.

is enough to constitute a consideration. But there is another view . . . is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertisers? . . . it appears to me that there is a distinct inconvenience, not to say a *detriment*, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise" (e).

The principal points to be remembered with regard to consideration are :—

- (i) that it must be given by the promisee;
- (ii) that, as a general rule, a past consideration is not sufficient to support a subsequent promise;
- (iii) that consideration must be of some legal value though its adequacy is, as a rule, immaterial.
- (iv) that it must be certain.

*Consideration must move from (i.e., must be furnished by) the promisee.*—It is a fundamental principle of English law that a person who seeks to enforce a simple contract must prove that some consideration was given *by him or his agent* (f) to the promisor or to some other person at the request of the promisor.

As we have already seen, the ground upon which the action of *assumpsit* originally lay was the detriment suffered by the plaintiff. When the contractual action of *assumpsit* was developed its ground might be either detriment suffered by the plaintiff or benefit conferred by him upon the defendant. But in all cases it was *by the plaintiff* that the detriment must be suffered or the benefit conferred. This was and has always remained the essential basis of an action founded on a simple contract.

Thus, in *Price v. Easton* (g), the plaintiff, John Price, sued the defendant for the sum of £13. This sum was owed to John Price by William Price, but the defendant had promised to pay it to John Price. The consideration for the defendant's promise was a promise made to him by William Price to work for him at certain wages and to leave those wages in his hands. *Held*, that although William Price had performed his promise, this gave no right of action to the plaintiff, because no consideration moved from the *plaintiff* to the defendant.

(e) *Id.*, per Lindley, L.J., [1893] 1 Q. B., at pp. 264, 265. For another instance, see *Bambridge v. Firmstone*, *post*, p. 46. See also *De la Bere v. Pearson*, [1906] 1 K. B. 280, 77 L. J. K. B. 380.

(f) *Fleming v. Bank of New Zealand*, [1900] A. C. 577; 69 L. J. C. P. 120.

(g) 4 B. & Ad. 438.

But this principle does not apply where consideration is supplied by an agent who obtains the promise on behalf of his principal (h).

*Past consideration is not as a general rule sufficient to support a simple contract.*—The consideration necessary to support a simple contract is in general either executed or executory consideration.

There is *executed consideration* when the promise of the defendant was given in exchange for an *act* by the plaintiff.

There is *executory consideration* when the promise of the defendant was given in exchange for a *promise* by the plaintiff.

Thus, if A pays B £100 in return for B's promise to do certain work for him, the consideration for B's promise is *executed*.

So also, if A offers to pay B £100 if B does a certain act, the *performance* of that act by B will constitute an *executed* consideration which converts A's offer into a promise.

If, however, A merely promises to pay B £100 in return for his promise to do the work, the consideration for the promise of each party is the *promise* by the other, and not its fulfilment, and is in each case *executory* (i).

In all cases the promise must be given in *exchange* for the consideration; it must be "the price for which the promise of the other is bought" (j), and must be "connected therewith in one contract" (k). A consideration which is *wholly past and bygone* will not sustain a subsequent promise unless it was rendered at the request of the promisor *and* under such circumstances that, even in the absence of an express promise, the law will imply a promise. Both these elements must exist; accordingly services rendered without a request, express or implied, cannot amount to consideration for a subsequent promise (l); nor can they do so even although rendered upon request, unless they are of such a nature or rendered under such circumstances that the law would imply a promise to pay for them (m), as, for instance, where a professional agent, such as an auctioneer, is employed in the ordinary course of his business (n). Acceptance of the consideration may raise a presumption that a request was made, but this, like any other presumption, may be rebutted.

(h) *Fleming v. Bank of New Zealand* (ubi supra).

(i) *Johnson v. Kearley*, [1908] 2 K. B., at p. 581; 77 L. J. K.B. 904.

(j) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A. C., at p. 855; 84 L. J. K. B. 1680.

(k) *Kennedy v. Broun*, 18 O. B. (N.S.), at p. 739; 32 L. J. C. P. 137; 184 R. 396.

(l) *Re Bogeda Co.*, [1904] 1 Ch., at p. 287; 73 L. J. Ch. 198.

(m) *Kennedy v. Broun* (ubi supra).

(n) See *Stewart v. Casey*, [1892] 1 Ch., at p. 115; 61 L. J. Ch. 61.

If the circumstances are such that a promise would be implied (o), a subsequent express promise may be treated "either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration *on the faith of which* the service was originally rendered" (p).

Where there is a contract based on an executed consideration that consideration will not support an express promise, made after the contract, which could not in the first instance have been implied.

Thus, in *Roscorla v. Thomas* (q), A sold a horse to B without giving any warranty. After the contract A, in consideration of B's purchase, warranted that the horse was sound. It was held that no action would lie upon this warranty. From the consideration of the purchase the only promise that could be implied was a promise to deliver the horse upon request; no warranty could be implied, and therefore none could be supported by a subsequent express promise.

From the rule that past consideration is insufficient it follows that a mere moral obligation is no consideration. Thus, in *Eastwood v. Kenyon* (r), the plaintiff, being guardian and agent of an infant, voluntarily spent his own money on improvement of her property, and, to repay himself, borrowed money from B. After her marriage her husband, who by his marriage had received the benefit of the expenditure, expressly promised the plaintiff that he would pay the amount that was due to B, and on that promise was sued by the plaintiff. It was held that the action would not lie, since the facts showed nothing but a past consideration conferred voluntarily by the plaintiff without any request by the defendant; it was also pointed out that, if a mere moral obligation amounted to sufficient consideration for a subsequent promise, this "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it" (s).

The same point was, however, subsequently raised in the case of *Beaumont v. Reeve* (t), where the plaintiff alleged that the defendant had seduced her and had thereby caused her damage,

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(o) *Roscorla v. Thomas*, 3 Q. B., at p. 237; 11 L. J. Q. B. 214; 61 R. R. 216.

(p) *Stewart v. Casey*, [1892] 1 Ch., at p. 116; 61 L. J. Ch. 61.

(q) 3 Q. B. 231. See also *Hopkins v. Logan*, 5 M. & W. 247; 8 L. J. Ex. 218; 52 R. R. 701.

(r) 11 Ad. & El. 438; 9 L. J. Q. B. 109; 52 R. R. 400.

(s) 11 Ad. & El., at p. 119.

(t) 8 Q. B. 483; 15 L. J. Q. B. 111; 70 R. R. 552.

and that in consideration thereof he had promised to pay her a sum of money. An action for seduction cannot, however, be brought by the woman seduced, but only by her parent or master. Accordingly the defendant was under no *legal* liability to the plaintiff from which a consideration could arise. It was accordingly again laid down by the Court that "a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise" (u).

But there is one class of exceptions to the rule that a past consideration will not support a subsequent promise (x).

Where the consideration for a contract has been executed, but the promisor is protected from legal liability by some rule of law made for his benefit, a subsequent promise made after the rule of law has ceased to operate can revive the previous consideration (y): thus, before the Infants' Relief Act, 1874, a contract made by an infant might be ratified by him after attaining full age. But this rule applies only when the consideration is executed and when the contract is valid, though unenforceable; not when the consideration is executory, or when the contract is illegal or void (z). And, similarly, a subsequent express promise can revive a promise which was originally made for valuable consideration, but has become barred by a Statute of Limitation (a). But this principle does not apply to a debt from which a bankrupt is released by his order of discharge, for no subsequent promise to pay such a debt can be enforced unless supported by a new consideration (b).

(u) But a promise of this kind must not be confused with a promise by a man to pay a sum to the mother of his illegitimate child for her support, for this is perfectly valid, as a mother by undertaking the entire support of such child does more than by law she is bound to do, and this forms a sufficient consideration for the promise: *Smith v. Roche*, 28 L. J. C. P. 237.

(x) It is sometimes stated that there is another exception to the rule, namely, where the plaintiff *voluntarily* does something that the defendant was legally compellable to do, and the defendant in consideration thereof subsequently promises to pay. The authority for this rule is, however, unsatisfactory. As to the *implied* contract arising where the plaintiff is *compelled* to do that which the defendant was legally compellable to do, see *post*, p. 78.

(y) See *Barle v. Oliver*, 2 Ex. 90; *Eastwood v. Kenyon*, 11 Ad. & El., at pp. 146, 447; *Beaumont v. Reeve*, 8 Q. B., at p. 487 ("an express promise cannot be supported by a consideration from which the law could not imply a promise except where the express promise does away with a legal suspension or bar of right of action which, but for such suspension or bar, would be valid").

(z) *Evans & Co. v. Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 698.

(a) *Post*, Part I, Chapter VI.

(b) *Jakeman v. Cook*, 4 Ex. D. 26; 48 L. J. Ex. 165.



*Consideration must be of some legal value.*—"Consideration means something which is of some value in the eyes of the law" (c).

In other words, the consideration which is required to support a simple contract means *valuable consideration* as distinct from good consideration; accordingly "natural love and affection are not a sufficient consideration whereon an action of *assumpsit* may be founded" (d).

Nor does a mere motive constitute consideration.

Thus, in *Thomas v. Thomas* (e), the defendant was an executor of J. T., who, immediately before his death, verbally expressed his wishes to make certain provisions for his wife E. T. After the death of J. T. the defendant entered into a written agreement with E. T., by which he agreed "in consideration of such desire" of J. T. to carry out these provisions. It was held that "motive is not the same thing with consideration"; to hold that mere respect for the wishes of the deceased was consideration would be confounding consideration with motive.

As a general rule, and subject to exceptions to be noted, the adequacy of the consideration is immaterial. "The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced" (f).

Thus, in *Bainbridge v. Firmstone* (g), the plaintiff alleged that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh two boilers, the defendant promised to return them in as good a condition as when lent, but failed to do so. It was held that there was sufficient consideration for the defendant's promise. "The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose that the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time" (*per* Patteson, J.).

Upon the same principle the giving of information by A, the patentee of a motor car fitment, to B, a motor car manufacturer, in order that B may test it, is good consideration for a promise by B not to use it except under licence from A (h).

(c) *Thomas v. Thomas*, 2 Q. B., at p. 859; 11 L. J. Q. B. 104; 90 R. R. 903.

(d) *Tweddle v. Atkinson*, 1 B. & S., at p. 399; 30 L. J. Q. B. 265; 124 R. R. 610.

(e) 2 Q. B. 851.

(f) *Bolton v. Madden*, L. R. 9 Q. B. 56; 43 L. J. Q. B. 35.

(g) 8 Ad. & El. 743; 53 R. R. 284.

(h) *Mechanical, etc., Co. and Schwess v. Austin and the Austin Motor Co.*, [1955] A. C. 346; 104 L. J. K. B. 408.

Again, in *Haigh v. Brooks* (i), the consideration for the promise by the defendant was the surrender to him of a document which purported to be a guarantee. The defence was that there was no consideration, because the guarantee did not comply with the provisions of the Statute of Frauds, and was therefore unenforceable. It was held that the surrender was nevertheless a valuable consideration. "The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he wanted by means of that promise . . . how can the defendant be justified in breaking this promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it?" (k).

But *inadequacy of consideration may be material* in certain cases, e.g., where it may be evidence of fraud (l) and in actions for specific performance (m).

Although, however, consideration need not, in general, be adequate, yet it must be *real*, i.e., of *some* value. Thus there is no consideration if a man promises to do something which is obviously impossible, either physically and naturally (n), or legally (o). So, also, there is no consideration if the promise *can* be of no legal value, as, e.g., a promise to surrender a lease at will, which the lessor can determine at any time (p). So also for the same reason the payment of part of a judgment debt cannot alone be any consideration for a promise by the creditor (not under seal) not to take any proceedings on the judgment, because it is apparent that the creditor cannot get any advantage merely by accepting part of the debt for the whole, and the agreement is therefore *nudum pactum* (q).

Thus, in *Foakes v. Beer* (r), A obtained judgment against B for £2,090. An agreement in writing was entered into between A and

(i) 10 Ad. & El. 309; 50 R. R. 399.

(k) 10 Ad. & El., at p. 318. As was also pointed out, it might not have been the mere pecuniary value that the defendant most regarded. "He may have had other objects and motives, and of their weight he was the only judge."

(l) See *post*, Part I, Chapter II.

(m) See *post*, Part I, Chapter VII, Section 2.

(n) That is to say, where "the thing stipulated for was, according to the state of the knowledge of the day, so absurd that the parties could not be supposed to have contracted": *Clifford v. Watts*, 11 R. 5 C. P., at p. 588; 40 L. J. C. P. 36.

(o) *Harvey v. Gibbons*, 2 Lev. 161; *Haslam v. Sherwood*, 10 Bing. 540; 3 L. J. C. P. 176; *Whitmore v. Farley*, 45 L. T. 99.

(p) *Longridge v. Dorville*, 5 B. & Ald., at p. 128.

(q) *Foakes v. Beer*, 9 A. C. 605; 54 L. J. Q. B. 180, reviewing all the earlier authorities.

(r) *Ubi supra*.

B by which, in consideration of the payment down by B of £500 and an undertaking to pay the balance of the sum of £2,090 by instalments, A agreed not to take any proceedings upon the judgment. After payment of the whole sum of £2,090 A sued for the interest thereon, and it was held by the House of Lords that the agreement was a *nudum pactum* and that she had a right to recover the interest. At the date of the agreement B owed her the sum of £2,090 under a judgment which carried interest at 4 per cent., arising *de die in diem* and at that date amounting to over £100. For the release of this she gained no benefit. To constitute a benefit there must be some independent advantage, not merely "that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length".

So also a concession as to the time and place of payment of a judgment debt made to the judgment debtor entirely in his own favour is no consideration for a promise by the judgment creditor to delay the service of a bankruptcy notice.

Thus, in *Vanbergen v. St. Edmunds Properties, Ltd.* (s), A owed B £208 for costs in respect of several actions. B by his solicitor agreed not to serve a bankruptcy notice upon A in respect of part of the debt if by a certain date he made payment of the whole amount to a bank at Eastbourne, where he was going in order to borrow the money. A brought an action for damages against B, alleging that he duly made payment as agreed, but that B nevertheless, in breach of the agreement, served the bankruptcy notice upon him. *Held*, that the agreement was a *nudum pactum*, the concession being made entirely to oblige A and giving no benefit to B.

But any benefit or possibility of benefit, however small, will constitute a consideration. Thus, if there was any doubt whether a lease was at will or for years, a promise to surrender it could be valuable consideration (t). And a promise to release a debt on payment of a lesser sum would be valid if the creditor got any further advantage, however small, as, *e.g.*, if payment were made before the day on which it was due (u). So, also, where A owed B several instalments under a hire-purchase agreement, but was unable to pay them himself, and, in consideration of A procuring a friend of his to send a cheque for part of the amount due, B promised to give him time for payment of the rest of the arrears, it was held that there was good consideration for the promise (x).

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(s) [1933] 2 K. B. 223; 102 L. J. K. B. 369.

(t) 5 B. & Ald., at p. 123.

(u) 9 A. C., at pp. 615, 616, 620.

(x) *Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256; 98 L. J. K. B. 490.

A promise to perform something which the promisor is already under an obligation to a *third party* to perform is a good consideration if the promisee thereby gets any benefit or the promisor thereby suffers any detriment.

Thus, in *Shadwell v. Shadwell* (y), A, the uncle of B, wrote to B a letter which was construed to be a promise to pay B the sum of £150 a year for a certain period if B married C to whom he was then engaged. B, in reliance on A's promise, married C. *Held*, that the promise of A was given for good consideration, because (i) there was a possible detriment to B who might on the faith of the promise have changed his position and incurred liabilities, and (ii) there was a benefit to A in obtaining the settlement of B as he desired.

Again, in *Scotson v. Pegg* (z), A, having contracted with B to deliver coal to C, subsequently entered into a contract with C under which he promised to deliver it to C if C would promise to take delivery at the rate of 49 tons a day. *Held*, that there was good consideration for C's promise. C, who was a stranger to the original contract, induced A to part with the cargo which he might not otherwise have been willing to do, and the delivery of it was a benefit to him. "A man may be bound by his contract to do a particular thing, but while it is doubtful whether or not he will do it, if a third person steps in and says: 'I will pay you if you do it', the performance is a valid consideration for the payment" (a).

But as a general rule there is no consideration if a man promises to do something which he is already under an obligation to do for the promisee (b), though there is consideration if he promises to do anything more than he is bound to do.

Thus, in the case of *Stilk v. Myrick* (c), some seamen deserted from a ship, and the captain, not being able to find others to take their places, promised to divide the wages of the deserters among the rest of the crew. It was held that there was no consideration for this promise, because there was nothing more than an ordinary emergency of the contract.

If, however, an extraordinary emergency arises, calling upon a seaman, or any other servant, to perform services altogether outside the scope of his original contract, he is discharged from his obligations and is free to make any new contract that he likes (d).

(y) 9 C. B. (N.S.) 159; 30 L. J. C. P. 145.

(z) 6 H. & N. 295; 30 L. J. Ex. 225; 128 R. R. 516.

(a) See also *Williams v. O'Keefe*, [1910] A. C., at p. 191; 79 L. J. P. C. 53.

(b) See *Jackson v. Cobbin*, 8 M. & W., at p. 797; 10 L. J. Ex. 389; 58 R. R. 869.

(c) 2 Camp. 317; 11 R. R. 717. See also *Yates v. Hale*, 1 T. R. 78; *Harris v. Carter*, 3 E. & B. 559; 28 L. J. Q. B. 295; 97 R. R. 651.

(d) *Hartley v. Ponsonby*, 7 E. & B. 870; 26 L. J. Q. B. 232 (seamen discharged by the desertion of so many of the crew that it was not reasonable to

Upon the same principle, although the performance of an ordinary legal duty will not support a promise to pay, in a case where a company had requisitioned police protection of a special character for a particular purpose, it was held that a promise to pay for their services would be implied and an express promise would not be without consideration (e).

*Consideration must be certain.*—If there is an essential term of a contract which has yet to be agreed and there is no express or limited contract for its solution the result is that there is no binding contract. When, however, an agreement has been executed on one side as, e.g., where goods have been delivered, the law will say that there is necessarily an implied contract that, in default of agreement, a reasonable sum is to be paid (f).

The waiver or abandonment of any legal right is a valuable consideration. Thus, the forbearance by the plaintiff, at the request of the defendant, to issue execution against (g) or to sue a third person (h) is sufficient consideration to support a promise by the defendant to pay a sum of money to the plaintiff. And the forbearance by a local Council from instituting proceedings to establish a right of way is good consideration to support a promise by the owner of a lane to allow the public to use it as a highway (i). If a right is questionable, then its abandonment is sufficient consideration to support a promise (j). Accordingly a compromise of "a serious claim, honestly made", is a valuable consideration, *whether or not the claim would have been successful* (k). "If an intending litigant *bona fide* forbears to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value" (l). But,

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require them to go to sea and a promise to pay them increased wages accordingly held to be good): *Liston v. Owners of S.S. Carpathian*, [1915] 2 K. B. 42; 84 L. J. K. B. 1135 (seamen discharged by increase of risk through outbreak of war and free to make new contract for increased remuneration).

(e) *Glasbrook Bros., Ltd. v. Glamorgan County Council*, [1925] A. C., at pp. 281, 282; 94 L. J. K. B. 272.

(f) *British Bank for Foreign Trade v. Norimex*, [1919] 1 K. B. 628; [1919] L. J. R. 656.

(g) *Smith v. Algar*, 1 B. & Ad. 603; 9 L. J. K. B. 79.

(h) *Creurs v. Hunter*, 19 Q. B. D. 341; 56 L. J. Q. B. 518.

(i) *Att.-Gen. v. Newton Abbott R. D. C. v. Dyer*, [1947] Ch. 67; 115 L. J. Ch. 232.

(j) *Longridge v. Dorville* (*ubi supra*).

(k) *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 582.

(l) 32 Ch. D. at p. 277.

since the claim must be *honestly* made, it follows that the principle does not apply where the person who threatens litigation knows that his claim is unfounded (*m*).

"There may be a contract the consideration for which is the making of another contract. 'If you will make such and such a contract I will give you one hundred pounds' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence . . . [but] . . . such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract are . . . viewed with suspicion by the law. They must be proved strictly" (*o*).

An example of such a collateral contract is afforded by the case of *Jacobs v. Batavia, etc., Trust* (*p*). Here a company issued a prospectus inviting subscriptions for deposit notes upon terms which had been already settled and were contained in the notes. The plaintiff applied for some deposit notes upon a form accompanying the prospectus which offered to persons who took deposit notes certain advantages in addition to those given by the notes. *Held*, that the contract in the prospectus was a collateral and independent contract. The offer on the prospectus was: If you take a deposit note, we will give you the benefits mentioned in the prospectus in addition to the benefit which you will have under the note itself.

*Failure of consideration.*—Money paid under a contract can be recovered if the consideration has wholly failed (*q*), as, for instance, where money has been paid for a forged bill of exchange (*r*) or for something which without the knowledge of the person paying had ceased to exist at the date of the contract, *e.g.*, money paid for an annuity in ignorance of the death of the annuitant (*s*), or where money has been paid under a contract which is not performed owing to the default of the other party (*t*).

But, unless the consideration is severable (*u*), this is not the case when there is only a partial failure of consideration; if, therefore,

(*m*) *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181; *Wade v. Simeon*, 2 C. B. 548; 15 L. J. C. P. 114.

(*o*) *Heilbut Symons & Co. v. Buckleton*, [1913] A. C., at p. 47; 82 L. J. K. B. 245; 107 L. T. 769.

(*p*) [1924] 2 Ch. 329; 98 L. J. Ch. 520.

(*q*) See further, *post*, p. 60.

(*r*) *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J. Q. B. 46.

(*s*) *Strickland v. Turner*, 7 Ex. 208; 22 L. J. Ex. 115; *Kennedy v. Thomasen*, [1929] 1 Ch. 426; 98 L. J. Ch. 98.

(*t*) *Fletcher v. Marshall*, 15 M. & W. 755; 71 R. R. 827.

(*u*) See *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L. J. Ch.

an apprentice or artied clerk pays a premium and the master dies before completion of the period of apprenticeship or articles, no portion of the premium can be recovered unless there is a stipulation providing for it (*x*).

The mere fact that a person has received some benefit under a contract does not prevent him from recovering what he has paid if he has received no part of that which he contracted to receive. Thus, where A, having no title to a motor car, sold it to B, who was compelled to surrender it to the true owner, it was held that B, although he had the use of the car for four months, was entitled to recover the purchase-money from A, as on a total failure of consideration, because the mere use of the car was no part of the consideration for which he had bargained, namely, the property and right to possession (*y*).

But if the person paying has got what he contracted for, he cannot recover back the money paid merely because it is of no value or he has made a bad bargain.

Thus, in *Chapman v. Speller* (*z*), goods were sold at a sheriff's sale and bought by the defendant for £18. The plaintiff bought the defendant's bargain for £5 and paid him the £23. The goods were not the property of the execution debtor and were claimed by the true owner. *Held*, that there was no failure of consideration, as the plaintiff had merely bought the defendant's right.

So also a person who buys an annuity could not recover what he paid merely because the annuitant died a moment after the purchase took effect (*a*).

#### SUB-SECTION 4.—*When writing is necessary*

In some cases simple contracts are required *either to be in writing or to be evidenced by writing*. Thus—

1. By the *Bills of Exchange Act*, 1882, bills of exchange (*b*) and promissory notes (*c*), and the acceptance (*d*) or

(*x*) *Whincup v. Hughes*, L. R. 6 C. P. 78; 40 L. J. P. C. 104; 24 L. T. 76; *Ferns v. Carr*, 28 Ch. D. 400; 54 L. J. Ch. 478; 52 L. T. 348. But in the event of the bankruptcy of the master provision is made by s. 34 of the Bankruptcy Act, 1914, for the return of a portion of the premium. And, by s. 40 of the Partnership Act, 1890, where a partner has paid a premium on entering into a partnership for a fixed term, and the partnership is determined before the end of the term, the Court may, subject to certain exceptions, order repayment of the premium or part thereof.

(*y*) *Rowland v. Divall*, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757.

(*z*) 14 Q. B. 621; 19 L. J. Q. B. 237.

(*a*) *Strickland v. Turner*, 7 Ex., at p. 117.

(*b*) S. 3 (1). The term "bill of exchange" includes cheques (s. 78).

(*c*) S. 83 (1).

(*d*) S. 17 (2) (a).

indorsement (e) of a bill of exchange and the indorsement of a promissory note (f), must be in writing.

2. By ss. 22 and 23 of the *Marine Insurance Act*, 1906, a contract of marine insurance is inadmissible in evidence unless embodied in a policy signed by or on behalf of the insurer.

3. Special agreements by a solicitor for his professional remuneration are not enforceable against his client unless they are in writing (g).

4. Contracts within s. 6 of the *Moneylenders Act*, 1927, are not enforceable by action unless a note or memorandum of the contract is made and signed personally by the borrower and the other requirements of the section are complied with (h).

5. By s. 4 of the *Sale of Goods Act*, 1898 (which replaces s. 17 of the Statute of Frauds), a contract for the sale of goods of the value of £10 is, subject to certain exceptions, unenforceable by action unless there is a similar note or memorandum of the contract.

6. In the case of certain contracts within s. 4 of the Statute of Frauds (i) and s. 40 of the *Law of Property Act*, 1925, either the agreement or some note or memorandum thereof must be in writing signed by the party to be charged or his authorised agent.

This Section of the book will deal only with the provisions of s. 4 of the Statute of Frauds (as amended by s. 40 of the *Law of Property Act*, 1925), and the rules governing the note or memorandum required by those sections and by s. 4 of the *Sale of Goods Act*.

*S. 4 of the Statute of Frauds and s. 40 of the Law of Property Act*, 1925.—These sections provide that *no action shall be brought*—

1. Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (k); or
2. Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person (k); or
3. To charge any person upon any agreement made in consideration of marriage (k); or

(e) S. 32 (1).

(f) S. 89 (1).

(g) *Post*, Part I, Chapter III, Section 7.

(h) *Post*, Part I, Chapter III, Section 7.

(i) 29 Car. 2, c. 3.

(k) S. 4 of the Statute of Frauds.



4. Upon any agreement that is not to be performed within the space of one year from the making thereof (k); or
5. Upon any contract for the sale or other disposition of land, or any interest in land (l);

unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

But it must be noted that in these five cases the effect of the statutes is purely negative. The absence of writing prevents an action from being brought, but the mere fact that an agreement or some memorandum thereof is in writing does not enable an action to be brought unless the agreement is made for valuable consideration and all the other elements of a valid contract are present.

*Special promises by executors or administrators to answer damages out of their own estate.*—Apart from any promise by him an executor or administrator is personally liable for the debts and liabilities of the testator or intestate to the extent of the assets which have come into his hands. The Statute of Frauds does not affect this liability and refers only to special promises by which an executor or administrator undertakes to be personally liable out of his own estate.

*Special promise to answer for the debt, default, or miscarriage of another person.*—These words apply to any contract which is a guarantee as distinct from a contract of indemnity, i.e., a contract to be answerable for the "debt, default or miscarriage" of another person who is primarily liable (m). An agreement to give a guarantee is also within the statute (n). The words "default or miscarriage" include, however, liabilities arising out of a tort as well as those arising from contract. Thus, where A wrongfully, and without the leave of B, rode B's horse and killed it, it was held that a promise by C to pay B a sum of money in consideration of his not bringing any action against A was a promise to answer for the default or miscarriage of another (o).

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(l) S. 10 of the Law of Property Act, 1925, slightly modifying the language of a similar provision in s. 4 of the Statute of Frauds.

(m) The distinction between a guarantee and a contract of indemnity will be explained in Part III, Chapter 3.

(n) *Mallett v. Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

(o) *Kirkham v. Minter*, 2 B. & Ald. 618; 21 R. R. 416.

*Agreement made in consideration of marriage.*—This does not mean the actual promise of marriage, the consideration for which is the *promise* by the other party, but refers to agreements for the doing of some collateral act in consideration of marriage, as, for example, an agreement to leave money by will (*p*), or to effect a marriage settlement (*q*).

Accordingly, an action for breach of promise of marriage may be brought without written evidence, provided that the promise is corroborated in some material respect.

*Any agreement not to be performed within one year from the making thereof.*—The expression “not to be performed” means not intended to be performed and capable of performance. Hence it includes:—

- (i) An agreement which from its terms is incapable of complete performance by either party within the year, *e.g.*:—

An agreement by which A contracts to supply to B a series of annual publications to be paid for by a deposit of £2 and a yearly subscription of £1 (*r*).

- (ii) An agreement which cannot be performed by one of the parties within the year and does not manifest any intention that the other party should fully perform his part within the year.

Thus there is an agreement within this clause when an employer hires a servant at a weekly wage and subject to a week's notice, but the servant is not for thirty-six months after leaving the service to be engaged in a similar business within radius of four miles (*s*).

- (iii) An agreement which distinctly shows on its face that the parties contemplated its duration for a definite period of more than a year, although it contains an express or implied term by which it *may* be terminated within the year (*t*); *e.g.*:—

An agreement to hire a carriage for five years terminable at any time on payment of one year's hire (*u*);

- (p) *Barkworth v. Young*, 4 Drew. 1; 26 L. J. Ch. 158.
- (q) *Caton v. Caton*, L. R. 2 H. L. 127; 36 L. J. Ch. 886.
- (r) *Boydell v. Drummond*, 11 East 141.
- (s) *Reeve v. Jennings*, [1910] 2 K. B. 522; 79 L. J. K. B. 1137.
- (t) *Dobson v. Collins*, 1 H. & N. 81; 25 L. J. Ex. 267; 108 R. R. 466, *Ex p. Acraman*, 31 L. J. Ch. 741; *Hanau v. Ehrlich*, [1911] 2 K. B. 1056 (reviewing the earlier authorities); [1912] A. C. 39; 81 L. J. K. B. 162, 397.
- (u) *Birch v. Earl of Liverpool*, 9 B. & C. 892; 38 R. R. 212.

An agreement to employ a man for two years subject to six months' notice (x);

An agreement to supply goods for three years subject to six months' notice (y);

An agreement to pay £80 a year for five years and then £60 for life (a);

An agreement for a three years' partnership (b);

An agreement for a year's service to begin on the day after the making of the contract is not within the section. Thus, a contract made on December 6, 1902, for a year's service to begin on December 7 is not within the section, for the service ends on December 6, 1903, and the law does not regard the fraction of the day upon which the contract was made (c). The agreement would, however, be within the section if the service was to begin on December 8 or any later date (d).

But the clause does not include—

- (i) An agreement intended to be performed and capable of performance by one party within the year.

Thus, where the tenant under a twenty years' lease, of which fourteen years had still to run, verbally promised his landlord that, in consideration of £50 to be laid out in alterations by the landlord, he would pay an additional rent of £5 a year during the remainder of the lease, it was held that, as the £50 was to be laid out and had been laid out within a year, the agreement was not within the section, and need not be in writing (e).

And where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed till after a year does not bring the case within the section, although such request be acceded to (f).

- (ii) An agreement for an indefinite period which, according

(x) *Hanau v. Ehrlich* (*ubi supra*).

(y) *Ex p. Acraman* (*ubi supra*).

(a) *Sweet v. Lee*, 3 Man. & G. 452; 60 R. R. 546.

(b) *Tomkins v. Randell*, 19 W. R. 418.

(c) *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1908] 1 K. B. 588; 72 L. J. K. B. 285; 88 L. T. 442.

(d) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Britain v. Rossiter*, 11 Q. B. D. 123; 48 L. J. Ex. 362.

(e) *Donnellan v. Read*, 3 B. & Ald. 899; 1 L. J. K. B. 269; 37 R. R. 588. It was also held that the contract was not one which related to any interest in land, because it gave no additional interest in the land either to the tenant or to the landlord, the so-called additional "rent" of £5 not being rent in the legal sense. See also *Cherry v. Hemming*, 4 Ex. 641; 19 L. J. Ex. 63; 80 R. R. 733, where a contract by A to assign a patent forthwith, and by B to pay for it by instalments over several years, was held not within the section.

(f) *Bevan v. Carr*, 1 Cab. & El. 499.

to the circumstances which happen, may or may not be performed within the year (g); *e.g.*:—

An agreement to pay a man money on his marriage (h);

An agreement to leave money by will (i);

An agreement to maintain a child for life (k);

An agreement to pay a wife a weekly sum for maintenance (l);

An agreement to employ a man as sole agent for the sale of patented goods until the patent is sold to a company (m).

*Any contract for the sale or other disposition of land or any interest in land.*—This section of the Law of Property Act, 1925, apparently reproduces the previous law, as settled by a series of decisions upon s. 4 of the Statute of Frauds (n), which applied only to contracts “operating upon an interest in land”, not to collateral or antecedent contracts (o).

So, where A agreed to let a house to B and to make certain improvements and alterations in the house, and B agreed to take the house and to pay for the improvements and alterations, it was held that this contract was within the Statute of Frauds (p): “the principal subject-matter of the agreement was the occupation of the premises . . . the consideration was entire, for the letting of the house with the alterations” (q).

But where A, in order to induce B to become his tenant, made an agreement that, if B became his tenant, he would subsequently do certain repairs, it was held that this agreement to do repairs, being antecedent and collateral to the contract of tenancy, was not within the Statute of Frauds: it was a separate agreement made to induce B to enter into a contract of tenancy, but not binding him to become tenant, and so not involving any agreement relating to an interest in land (r).

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(g) *Souch v. Strachbridge*, 2 C. B., at p. 815; 15 L. J. C. P. 170; *Hanau v. Ehrlich* (*ubi supra*).

(h) *Peter v. Compton*, Skin. 353.

(i) *Ridley v. Ridley*, 34 L. J. Ch. 462.

(k) *Murphy v. Sullivan*, 11 Ir. Jur. (N.S.) 111.

(l) *McGregor v. McGregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 491.

(m) *Lavelette v. Richards*, 24 T. L. R. 386.

(n) The corresponding words in the Statute of Frauds were: “Any contract or sale of lands, tenements or hereditaments or any interest in or concerning them.”

(o) *Boston v. Boston*, [1904] 1 K. B., at p. 127; 73 L. J. K. B. 17. See *Jameson v. Kinnell Bay Land Co.*, 47 T. L. R. 593, where it was held that an oral promise by a vendor of land to build across other land not included in the conveyance a road giving access to the land sold was not within s. 40 of the Law of Property Act, 1925.

(p) *Vaughan v. Hancock*, 3 C. B. 766; 16 L. J. C. P. 1; 71 R. R. 488. See also *Mechelin v. Wallace*, 7 Ad. & El. 49; 6 L. J. K. F. 217; 45 R. R. 669.

(q) *Vaughan v. Hancock*, 3 C. B., at p. 769.

(r) *Angell v. Duke*, L. R. 10 Q. B. 174; 44 L. J. Q. B. 78. See also *Hoby v. Roebuck*, 7 Taunt. 157; 17 R. R. 477; *Mann v. Nunn*, 43 L. J. C. P. 241; *Donnellan v. Read*, 3 B. & Ad. 899; 1 L. J. K. B. 269; 37 R. R. 588 (see *ante*, p. 56).

On the same principle an agreement between A and B that, if B bought a house, A would repay him the amount of the purchase-money, was held not to be within the Statute of Frauds (s); it "created no obligation to acquire an interest in land, it did not affect the owner of the land mentioned, nor did it create or deal with the interest of anyone in it" (t).

A contract which gives a mere licence to go upon or use land does not pass any interest in the land to the licensee, but merely prevents him from being a trespasser. Accordingly, a contract for the use of a dock, but not giving any exclusive right to its possession, was held not to be within the Statute of Frauds (u). But a contract which is not merely for a licence but also for a right in the nature of a *profit à prendre*, i.e., a right to take something out of the land, creates an interest in land (x); thus a contract for the right to shoot over land and to take away part of the game killed was within the Statute of Frauds (y).

Upon the same principle a contract for the letting of apartments was within the Statute of Frauds (z), but not a contract for board and lodging (a).

Contracts for the sale of emblements or *fructus industriales* were not within s. 4 of the Statute of Frauds, but were contracts for the sale of goods, and were formerly governed by s. 17 of the Statute of Frauds, which was replaced by s. 4 of the Sale of Goods Act, 1893 (b).

But with regard to *fructus naturales*, the rules laid down before 1893 were that if the seller was to sever them the contract

(s) *Boston v. Boston* (ubi supra).

(t) *Id.*, [1901] 1 K. B., at p. 127.

(u) *Wells v. Kingston-upon-Hull Corporation*, 11 R. 10 C. P. 402; 44 L. J. C. P. 257.

(x) See *Frank Warr & Co., Ltd. v. London County Council*, [1904] 1 K. B. 713; 73 L. J. K. B. 362.

(y) *Webber v. Lee*, 9 Q. B. D. 315; 51 L. J. Q. B. 485.

(z) *Edge v. Stafford*, 1 C. & J. 391; 9 L. J. Ex. 101; 35 R. R. 746; *Inman v. Stamp*, 1 Stark. 12; 18 R. R. 740. That is to say, provided that the occupier was not to be a mere lodger, but was to have such an exclusive possession of the apartments as would entitle him to maintain trespass or ejectment for a disturbance of his possession: see *Illan v. Overseers of Liverpool*, L. R. 9 Q. B., at pp. 191, 192; 43 L. J. M. C. 69; *R. v. St. George's Union*, L. R. 7 Q. B. 90; 41 L. J. M. C. 30. It must be noted that the statements in the text have reference only to executory agreements for a tenancy, not to cases in which a tenancy is actually created either by lease or by entry under an agreement for a lease.

(a) *Wright v. Slavert*, 2 E. & E. 721; 29 L. J. Q. B. 161; 119 R. R. 130.

(b) *Evans v. Roberts*, 5 B. & C. 829; 4 L. J. K. B. 318; 29 R. R. 421 (potatoes); *Jones v. Flint*, 10 Ad. & El. 753; 9 L. J. Q. B. 252; 50 R. R. 527 (corn and potatoes).

was for the sale of goods and was within s. 17 (c); but if the buyer was to sever them the contract was within s. 4 (d), *unless* he was to sever them *at once*, so that they would not derive any benefit from remaining in the soil (e).

A contract for the sale of unsevered *fixtures* did not come within either s. 4 or s. 17 (f); but, before 1898, a contract for the sale of other things affixed to the soil was within s. 4 (g).

Now, by s. 62 of the *Sale of Goods Act*, 1898, the term "goods" includes "emblements, industrial growing crops (h), and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Accordingly, whenever a contract for the sale of any such subject-matter contemplates severance, either by the seller or by the buyer, it is a contract for the sale of goods and is governed by the provisions of the *Sale of Goods Act*, 1898.

*Contents of the memorandum or note.*—The memorandum must contain:—

1. *The names of the parties or descriptions by which they are sufficiently identified or capable of identification* (i). "The statute will be satisfied if the parties are sufficiently described so that their identity cannot be fairly disputed" (k). Thus, "if the vendor is described as 'proprietor', 'owner', 'mortgagee', or the like, the description is sufficient, though he is not named; but if he is described as 'vendor', or as 'client', or 'friend' of a named agent, that is not sufficient, the reason . . . being . . . that the former description is a statement of fact, as to which there can be perfect certainty . . . the reason against the latter description being that in order to find out who is vendor, client or friend, you must go into evidence on which

(c) *Smith v. Surman*, 9 B. & C. 561; 7 L. J. Q. B. 296; 33 R. R. 259 (growing timber).

(d) *Crosby v. Wadsworth*, 6 East 602; 8 R. R. 566 (mowing grass).

(e) *Marshall v. Green*, 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 104 (growing timber).

(f) *Hallen v. Runder*, 1 C. M. & R. 266; 3 L. J. Ex. 260; *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J. Q. B. 540; 34 L. T. 759.

(g) *Lavery v. Pursell*, 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846 (contract for the sale of the materials of a house which were to be cleared away in two months).

(h) This term includes crops which, though owing their existence to skill and labour, are not included in "emblements", that expression being confined to such crops as ordinarily repay the labour of producing them within the year in which the labour is bestowed: *Graves v. Weld*, 5 B. & Ad. 106; 2 L. J. K. B. 176; 39 R. R. 419.

(i) *Stokes v. Whicler*, [1920] 1 Ch. 411; 89 L. J. Ch. 198. See also *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J. Ch. 81.

(k) *Lovesy v. Palmer*, [1916] 2 Ch., at p. 240; 85 L. J. Ch. 481.

there might possibly . . . be a conflict, and that . . . is exactly what the Act [*i.e.*, the Statute of Frauds] says shall not be decided by parol evidence" (l).

But the names of the parties must appear *as such parties*, *i.e.*, the seller must be named or described as seller, and the purchaser as purchaser (m).

Thus, in *Vandenbergh v. Spooner* (n), A bought a quantity of marble from B and signed the following memorandum: "A agrees to buy the whole of the lots of marble purchased by B, now lying at Lyme Cobb, at 1s. a foot." *Held*, that there was no sufficient memorandum, because the seller's name was not mentioned as seller, but occurred only as part of the description of the goods.

If the memorandum is made by an agent for an undisclosed principal, oral evidence is admissible to prove who is the principal (o), provided that by the memorandum the agent is himself liable on contract (p). Where, however, a memorandum is signed by X as "agent for A (hereinafter called the vendor)" oral evidence is not admissible to vary the memorandum by proving that in fact there were two vendors, namely, A and B (q).

2. *The name or a sufficient description of the property.*—Here also, as in the case of the parties, *Id certum est quod certum reddi potest*. If, therefore, there is in the memorandum a description of the property which is sufficient to enable it to be identified it may be identified by oral evidence (r).

Thus, the following have been held to be sufficient descriptions:—

(i) "Mr. Ogilvie's house" (s);

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(l) *Jarrett v. Hunter*, 34 Ch. D., at p. 184; 56 L. J. Ch. 141, and cases there cited. See also *Carr v. Lynch*, [1900] 1 Ch. 613; 69 L. J. Ch. 345.

(m) *Dewar v. Mintoft*, [1912] 2 K. B., at p. 385; 81 L. J. K. B. 385; *cp. Cohen v. Roche*, [1927] 1 K. B. 169; 95 L. J. K. B. 945; 136 L. T. 219; 42 T. L. R. 674.

(n) L. R. 1 Ex. 316; 35 L. J. Ex. 201; 14 L. T. 701. Doubted in *Cohen v. Roche*, [1927] 1 K. B. 169; 95 L. J. K. B. 945.

(o) *Filby v. Hounsell*, [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270.

(p) *Lovesy v. Palmer* (*ubi supra*). If an agent contracts only as agent for an unnamed or undescribed principal and not on his own account, he can neither sue nor be sued upon the agreement. An unnamed and undescribed principal cannot sue or be sued upon a contract for which a written memorandum is required, except where by the memorandum the agent is himself liable on the contract, for otherwise there is no memorandum of any agreement at all: [1916] 2 Ch., at pp. 242, 243, 244.

(q) *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513. And this is not affected by the fact that A and B are partners, because s. 5 of the Partnership Act, 1890, did not override s. 4 of the Statute of Frauds: *Keen v. Mear* (*ubi supra*).

(r) *Shardlow v. Colterrell*, 20 Ch. D. 90; 51 L. J. Ch. 353; *Auerbach v. Nelson*, [1919] 2 Ch. 383; 88 L. J. Ch. 193.

(s) *Ogilvie v. Foljambe*, 3 Mer. 53; 17 R. R. 18, approved in *Bank of New Zealand v. Simpson*, 62 L. T., at p. 104.

- (ii) "Property purchased at £420 at the Sun Inn Preston on the above date" (*i.e.*, the date of the memorandum) (*t*);
- (iii) "Twenty-four acres of land at Totmanslow, in the parish of Draycott" (*u*);
- (iv) A receipt for a deposit on a house described as sold by N to A for £500 on November 21, 1918 (*x*).

8. All the material (*y*) terms of the contract, including the consideration (*z*).

Thus, an agreement for a lease must state expressly or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence (*a*).

And on an agreement for the sale of goods the mode of delivery against payment must be stated (*b*).

But in the case of guarantees it was provided by s. 3 of the *Mercantile Law Amendment Act*, 1856, that the promise of the defendant "shall not be deemed invalid to support an action . . . by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document".

And, on a contract for the sale of goods, if no price has been fixed, the memorandum is complete without any mention of the price, because in such cases the law implies a promise to pay a reasonable price (*c*). But, if the price has been fixed, it must be mentioned in the memorandum (*d*).

Where, however, a term of no great importance is exclusively for the benefit of one party, he may sometimes waive it and enforce the contract, though the memorandum contains no evidence of that term (*e*).

(*t*) *Shardlow v. Cotterell* (*ubi supra*). In this case it was said by Jessel, M.R., that any two specific terms are enough to point out sufficiently what is sold, *e.g.*, "the estate of B in the county of C", or "the estate of A B which he bought of C D".

(*u*) *Plant v. Bourns*, [1897] 2 Ch. 281; 66 L. J. Ch. 643.

(*z*) *Auerbach v. Nelson* (*ubi supra*).

(*y*) *Blackburn v. Walker*, [1920] W. N. 291; "substantial parts" (*Wilkinson v. Evans*, 9 C. B. (N.S.), at p. 857); "essential terms" (*id.*, at p. 860).

(*x*) *Wain v. Warlters*, 5 East 10; 7 R. R. 645; *Potter v. Peters*, 64 L. J. Ch at p. 360.

(*a*) *Humphery v. Conybeare*, 80 L. T. 40; 15 T. L. R. 162.

(*b*) *Thurkell v. Cambi*, [1919] 2 K. B., at p. 598; 89 L. J. K. B. 1.

(*c*) Sale of Goods Act, 1893, s. 8 (2), and see *Hoadley v. M' Laine*, 10 Bing 483; 3 L. J. C. P. 162; 38 R. R. 510. So also "an implied term such as that a vendor must make a good title" need not be in the memorandum, *Hawkins v. Price*, [1947] Ch., at p. 654.

(*d*) *Elmore v. Kingscote*, 5 B. & C. 583; 29 R. R. 341.

(*e*) *Hawkins v. Price*, [1947] Ch. 645; [1947] L. J. R. 887.



*Signature.*—The memorandum need not be signed by both parties (f), but it must be *signed by the party to be charged or some other person thereunto by him lawfully authorised*. For the purposes of the statutes there is a sufficient signature if the name of the party to be charged is inserted in the agreement, or appropriated to the agreement, as the name of the party with whom the agreement is to be made, either by himself or by his authorised agent (g). And it is immaterial what form the signature takes (*i.e.*, whether it is written or printed) (h), and whether it is in the body of the memorandum or at the beginning or end (i), provided that it is intended to authenticate and ratify the *whole* agreement (j).

Thus it has been held that there was a sufficient signature in the following cases:—

- i. Where the defendant wrote a letter beginning “I, James Crockford, agree to sell” (k).
- ii. Where a clerk of the defendants (H. M. & Co.), with their authority, drew up the following document and handed it to the plaintiff for his signature:—

“Messrs. Hoare Mann & Co., 26, 29, Bridge Row, London, E.C. Gentlemen,—In consideration of your advancing my salary, etc., I hereby agree to continue my engagement in your office for three years, etc.

“Yours obediently,

“GEORGE EVANS” (l).

- iii. Where the defendant (John Dodgson), on purchasing hops from the plaintiff, wrote a memorandum, afterwards signed by the plaintiff's agent, beginning “Sold John Dodgson, 27 pockets Playsted, 1836, Sussex, at 108s., etc.” (m).
- iv. Where the defendant (Norris), on selling yarn to the plaintiff, handed to him an invoice, at the top of which his own name (Norris) was printed and in which he

(f) *Laythourp v. Bryant*, 2 Bing. N. C. 785; 5 L. J. C. P. 217.

(g) *Evans v. Hoare*, [1892] 1 Q. B. 593; 61 L. J. Q. B. 470; *Hucklesby v. Hook*, 82 L. T. 117; see also *Horner v. Walker*, [1923] 2 Ch. 218; 92 L. J. Ch. 578.

(h) *Saunders v. Jackson*, 2 B. & P. 188; 5 R. R. 580; *Schneider v. Norris*, 2 M. & S. 286; 15 R. R. 250.

(i) [1892] 1 Q. B., at p. 597.

(j) *Caton v. Caton*, L. R. 2 H. L. at pp. 139, 143; 36 L. J. Ch. 886; 148 R. R. 273; *Cohen v. Roche*, [1927] 1 K. B. 169; 96 L. J. K. B. 945.

(k) *Knight v. Crockford*, 1 Esp. 190; 5 R. R. 729.

(l) *Evans v. Hoare* (*ubi supra*).

(m) *Johnson v. Dodgson*, 2 M. & W. 653; 6 L. J. Ex. 185.

himself had written the name of the plaintiff, thus inserting the plaintiff's name as buyer in a paper in which he recognised himself as seller and appropriating the printed name to the agreement as a signature (n). On the same principle it has been held that there was a sufficient signature by the defendant, who was an auctioneer, where his name was printed upon the front page of his sale catalogue, the leaves of which were pasted into a book in such a way as to leave a space in which, at the sale, he made, against each lot, an entry of the price and the purchaser (o).

*Signature of agent.*—A person “who signs as an agent must be authorised to sign a memorandum of a contract of the nature of that on which the plaintiff relies, and . . . it is for the plaintiff to prove that the signatory was an agent so authorised” (p). Thus, a solicitor who merely has instructions from his client to prepare a draft contract has no implied authority to sign a memorandum of the contract (q), and a solicitor whose instructions are to deny the existence of a contract has no authority to bind his client by signing a memorandum of a contract (r). One party cannot sign as the agent for the other (s), but one agent may have authority to sign for both parties, as in the case of a broker (t), or auctioneer (u).

(n) *Schneider v. Norris*, 2 M. & S. 286; 15 R. R. 250. With this must be carefully compared the case of *Hucklesby v. Hook*. 82 L. T. 177, where, though a letter was written by the plaintiff to the defendant upon paper printed with the name and address of the defendant, the evidence showed that the printed name of the defendant had not been appropriated to the contract.

(o) *Cohen v. Roche* (ubi supra).

(p) *Thirkell v. Cambi*, [1919] 2 K. B., at p. 598, explaining and distinguishing *John Griffiths Cycle Corporation v. Humber & Co.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 969, and *Daniels v. Trefusis*, [1914] 1 Ch. 788; 83 L. J. Ch. 579. See also *Ridgway v. Wharton*, 6 H. L. C., at p. 296; *Smith v. Webster*, 3 Ch. D. 49; 45 L. J. Ch. 528; 35 L. T. 44; *North v. Loomes*, [1919] 1 Ch. 878; 88 L. J. Ch. 217; 120 L. T. 538; *Koenigsblatt v. Sweet*, [1928] 2 Ch. 314; 92 L. J. Ch. 598; 129 L. T. 659; 39 T. L. R. 576. A pleading signed by counsel in previous proceedings is a memorandum by an authorised agent: *Grindell v. Bass*, [1920] 2 Ch. 487; 89 L. J. Ch. 591; 124 L. T. 211; 36 T. L. R. 867; *Farr, Smith & Co. v. Messers*, [1928] 1 K. B. 397; 97 L. J. K. B. 126; 138 L. T. 154; 44 T. L. R. 48.

(q) *Smith v. Webster*, 3 Ch. D. 49; 45 L. J. Ch. 528.

(r) *Thirkell v. Cambi*, [1919] 2 K. B. 590; 89 L. J. K. B. 1.

(s) *Farebrother v. Simmons*, 3 B. & Ald. 388; 24 R. R. 399; *Sharman v. Brandt*, 6 Q. B. 720; 43 L. J. Q. B. 312.

(t) *Thompson v. Gardiner*, 1 C. P. D. 777.

(u) *Bell v. Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397. *Wilson v. Pike*, [1949] 1 K. B. 176; [1949] L. J. R. 17.

*Form of the memorandum or note.*—The statutes do not make it necessary that the contract should be in writing; their requirements are satisfied if there is “a signed admission (*i.e.*, by the defendant) that there was a contract and a signed admission of what that contract was” (*x*), and for that purpose “any writing embodying the terms of the contract and signed by the party to be charged is sufficient” (*y*). Thus it is sufficient if there is a written offer containing the terms of the contract, even though the acceptance is oral (*z*).

Nor is it necessary that any idea of agreement should have been present to the mind of the party signing the memorandum (*a*). Accordingly, it has been held that the statutory requirements were met by an admission contained in a letter written by the defendant to his own agent (*b*), or in an affidavit made by him for some other purpose (*c*), or in his will.

Thus, in *Re Hoyle*, *Hoyle v. Hoyle* (*d*), a testator had in his lifetime made a verbal promise to guarantee the payment of debts due from his son to a certain firm, and in his will and codicil he recited this fact. In the administration of his estate the firm made a claim under the guarantee, and it was held that the recital of the guarantee in the will and codicil was a memorandum or note in writing which satisfied section 4 of the Statute of Frauds.

A letter written by the defendant to the plaintiff, recognising the existence of a contract and its terms, is not prevented from being a sufficient memorandum merely because the defendant denies his liability under the contract.

Thus, in the case of *Bailey v. Sweeting* (*e*), A bought from B some chimney-glasses for £38 10s. 6d. The glasses being damaged in transit, A refused to receive them and wrote to B as follows: “The parcel of goods selected . . . was the chimney-glasses, amounting to £38 10s. 6d., which . . . I have long since declined to have, for reasons made known to you at the time.” It was held that, as this letter recited all the essential terms of the bargain, it was none the less a note or memorandum thereof, because it was accompanied by a statement that the defendant did not consider himself liable in law for the performance of it

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(*x*) *Thirkell v. Cambi*, [1919] 2 K. B., at p. 597; 89 L. J. K. B. 1; 121 L. T. 532; 35 T. L. R. 652.

(*y*) *Re Hoyle*, [1898] 1 Ch., at p. 98; 62 L. J. Ch. 182; 67 L. T. 674.

(*z*) *Reuss v. Pickles*, L. R. 1 Ex. 342; 35 L. J. Ex. 218.

(*a*) *Re Hoyle* (*supra*).

(*b*) *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5; 18 L. T. 293.

(*c*) *Barkworth v. Young*, 4 Drew. 1; 36 L. J. Ch. 153; 118 R. R. 297.

(*d*) [1898] 1 Ch. 84.

(*e*) 9 C. B. (N.S.) 843; 30 L. J. C. P. 150; 127 R. R. 896 (a decision upon s. 17 of the Statute of Frauds). See also *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224; *Burton v. Rust*, L. R. 7 Ex. 279; 41 L. J. Ex. 1; *Dewar v. Mintoft*, [1912] 2 K. B., at p. 387; 81 L. J. K. B. 885.

This principle does not, however, apply where the defendant, though admitting a contract, sets up terms which are different from those alleged by the plaintiff (f).

Similarly, a letter signed by the defendant and referring to other letters or documents as containing the terms of a contract, may be a sufficient note or memorandum, although it repudiates liability (g); but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum (h).

From the preceding paragraph it will be observed that the memorandum or note may be made out from more than one document. As to this, the rule formerly was that, when a writing signed by the defendant or his agent referred to some other document, that document might be incorporated into the signed writing so as to make up a complete memorandum or note, provided that it could, *without oral evidence*, be identified by means of the reference contained in the signed writing (i). The present rule, however, is that if the writing signed by the defendant refers to some other transaction which may have been in writing, oral evidence is admissible to prove that such transaction was in writing and to identify a particular document as being the transaction to which the reference is made (k). Thus, where a writing signed by the defendant or his agent refers to previous "instructions" (l), or to a previous "offer" (m), or "arrangement" (n), oral evidence is admissible to show that such "instructions", or "offer", or "arrangement" were in writing and were contained in a document which is produced and which, being so identified, becomes incorporated with the signed writing, and thus makes up a complete note or memorandum.

The extent to which this principle goes may be illustrated by two cases.

In the case of *Long v. Millar* (o), the plaintiff signed an agreement "to purchase three plots of land in Richford Street, Hammersmith,

(f) *Smith v. Surman*, 9 B. & C. 561; 7 L. J. Q. B. 296; 33 R. R. 259.

(g) *Dewar v. Mintoft*, [1912] 2 K. B. 373; 81 L. J. K. B. 885.

(h) *Thurkell v. Cambi*, [1919] 2 K. B. 590; 89 L. J. K. B. 1.

(i) *Boydell v. Drummond*, 11 East 158; 10 R. R. 450.

(k) *Ridgway v. Wharton*, 6 H. L. C. 298; 27 L. J. Ch. 46; *Baumann v. James*, 3 Ch. D. 508; *Stokes v. Whicher*, [1920] 1 Ch. 411; 89 L. J. Ch. 198.

See also *Hill v. Hill*, [1947] Ch., at pp. 240, 241.

(l) *Ridgway v. Wharton* (*ubi supra*).

(m) *Long v. Millar*, 4 C. P. D., at p. 454; 48 L. J. C. P. 596.

(n) *Cave v. Hastings*, 7 Q. B. D. 125; 50 L. J. Q. B. 575.

(o) 4 C. P. D. 450; 48 L. J. C. P. 596. See also *Reading Trust, Ltd. v. Spero*, [1930] 1 K. B. 492; 99 L. J. K. B. 186.

for the sum of £310 and . . . to pay as a deposit the sum of £31"; the defendant did not sign this agreement, but signed the following receipt: "Received of Mr. G. Long the sum of £31 as a deposit on the purchase of three plots of land at Hammersmith." It was held that the word "purchase" meant agreement to purchase, and that oral evidence was admissible to prove that this agreement was in writing and to identify it with the agreement signed by L.

In the case of *Oliver v. Hunting (p)*, the defendant agreed to sell to the plaintiff for £2,375 a freehold estate known as the F. M. H. estate and signed a memorandum which contained all the essential terms of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards the plaintiff sent to the defendant a cheque for £375 as deposit and part payment of the price, and the defendant, in reply, wrote: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the F. M. H. estate." It was held that, since this letter contained a reference to the F. M. H. estate as the subject of a sale, oral evidence was admissible to prove the circumstances under which it was written and to show that the reference was to the previous memorandum of agreement, so enabling the two documents to be read together as a complete memorandum.

It must be noted that oral evidence is admissible only to identify the document to which reference is made in the writing signed by the defendant or his agent. If no reference to another document appears on the face of the signed writing, oral evidence is not admissible to show that it was intended to refer to another instrument (q).

But documents which form the actual component parts of a memorandum made at one time may be identified and connected by oral evidence though there is no reference in one to the other.

Thus, in *Pearce v. Gardner (r)*, where the defendant wrote to the plaintiff a letter containing all the terms of the contract, but beginning "Dear Sir", and not containing the name of the plaintiff, it was held that the plaintiff might prove that he received the letter in an envelope bearing his name and that the letter and envelope could be taken together to constitute a memorandum in writing within section 4 of the Statute of Frauds or section 4 of the Sale of Goods Act, 1893.

So also in *Jones Brothers, Ltd. v. Joyner (s)*, the plaintiff's name was on a leather case and the rest of the memorandum, signed by the defendant, was in a paper book which was merely slipped into the case, so that it could be removed when full and replaced by another. It was held that the two could be taken together to constitute a memorandum.

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(p) 44 Ch. D. 205; 59 L. J. Ch. 255.

(q) *Potter v. Peters*, 61 L. J. Ch. 357.

(r) [1897] 1 Q. B. 688; 66 L. J. Q. B. 457.

(s) 82 L. T. 878. See also *Long v. Millar*, 4 C. P. D., at p. 435; *Hill v. Hill*, [1947] Ch., at p. 241.

*The effect of non-compliance with the statutes.*—If there is no memorandum the contract is *unenforceable by action* (t). The statutes do not affect the validity of the contract (u), but only make a particular kind of evidence necessary (w); that evidence must, moreover, be in existence at the commencement of the action; if it comes into existence subsequently and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another (x).

But the operation of the statutes is excluded in four cases :

- i. Where they are not expressly pleaded by the defendant (y).
- ii. Where property is sold under an order of the Court (z).
- iii. " In order to prevent the statute from being used in order to commit a fraud " (a), as for instance where the defendant has obtained the property of the plaintiff by fraud (b).
- iv. Where, *in an action for specific performance*, there has been part performance of the contract by the plaintiff, so that it would be a fraud on the part of the defendant to set up the statute (c).

Moreover a party to an agreement which is unenforceable for want of a written memorandum may in some cases have an *alternative* right of action. Thus, although he cannot enforce the express agreement, he may nevertheless, if under the agreement he has rendered any services to the other party, sue upon a *quantum meruit*, i.e., upon an implied promise by the defendant to pay for the services actually rendered. Accordingly, it has been held that a farm labourer who, by an oral agreement, was employed under a contract of service not to be performed within a year, could sue on an implied contract to pay a reasonable sum for the services actually rendered by him (d).

(t) See *Morris v. Baron & Co.*, [1918] A. C., at p. 11; 87 L. J. K. B. 145.

(u) *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889; *Re Holland*, [1902] 2 Ch., at p. 375; 71 L. J. Ch. 518; 86 L. T. 542; 18 T. L. R. 568. Accordingly, money paid under it cannot be recovered: *Sweet v. Lee*, 3 Man & G. 542; 60 R. R. 546.

(w) *Re Hoyle*, [1898] 1 Ch., at p. 97; 62 L. J. Ch. 182.

(x) *Lucas v. Dixon*, 22 Q. B. D. 397; 58 L. J. Q. B. 161.

(y) R. S. C. Order XIX, r. 15.

(z) *Att.-Gen. v. Day*, 1 Ves. Sen. 218.

(a) *Rochefoucauld v. Boustead*, [1897] 1 Ch., at p. 207; 66 L. J. Ch. 74.

(b) See *Davis v. Whitehead*, [1894] 2 Ch., at p. 145; 63 L. J. Ch. 471.

(c) For a discussion of this principle, see *Rawlinson v. Ames*, [1925] Ch. 96; 94 L. J. Ch. 118.

(d) *Scott v. Pattison*, [1928] 2 K. B., at p. 727; 92 L. J. K. B. 886. See also *Knowlman v. Bluett*, L. R. 9 Ex. 307; 48 L. J. Ex. 151; *Pulbrook v. Lawes*, 1 Q. B. D. 284; 45 L. J. Q. B. 178.

So also, an action upon an account stated (e) will lie for a debt due under an agreement which is unenforceable for want of a written memorandum (f).

But a plaintiff cannot from acts done under an unenforceable contract set up an implied contract to the same effect.

Thus, in *Brittain v. Rossiter* (g), A entered into an oral contract of service which was not to be performed within one year and remained some months in the defendant's service when he was dismissed on three months' notice. *Held*, that he could not from his part performance of the express contract set up an implied contract to serve for a year.

### SECTION 3.—*Specialty Contracts*

A specialty, or contract under seal, is the only *formal* contract, because it derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but because it is expressed in the form of a *deed*.

A deed is a writing, sealed by the party to be bound and delivered to the party to be benefited thereby, constituting and testifying to the grant or creation by the former of some interest in property or of some right or his assumption of some contractual liability, or both granting or creating an interest or right and at the same time imposing a contractual obligation.

A deed may be executed by only one party, binding him alone, or it may be executed by two or more parties and may contain promises by both. In the former case it was termed a *deed poll*, because it was polled (*i.e.*, cut even) at the top. In the latter case it was called an indenture because originally two copies were made on the same parchment which then, in order to facilitate proof of the identity of each copy, was cut through the middle by a waved or indented line. After this practice ceased it remained customary to describe a deed executed between two or more parties as an indenture, but by s. 57 of the Law of Property Act, 1925, it is provided that any deed may be described simply according to its effect, *e.g.*, as a "conveyance" or "lease".

*The execution of a deed.*—The common law essentials for the execution of a deed are the sealing and delivery. As to the sealing, the placing of a finger upon a seal or wafer already

(e) *Post*, p. 76.

(f) *Cocking v. Ward*, 1 C. B. 858; 15 L. J. C. P. 245; see also *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 48.

(g) 11 Q. B. D. 123. 48 T. T. R. 632

affixed is, in practice, deemed sufficient. Delivery does not necessarily entail a physical transfer, and may be by any acts or words that sufficiently show that it was intended to be finally executed, even though it remains in the possession of the maker (h). "The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it" (i). "And it is clear on the authorities . . . that the deed [when sealed and delivered] is binding on the obligor before it comes into the custody of the obligee, nay, even before he knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it" (k).

The maker of a deed may deliver it so as to suspend or qualify its binding effect by expressly declaring or in any way indicating his intention that it shall have no effect until a certain time has arrived, or till some condition has been performed. In such a case the instrument is in the meantime a mere *escrow*; but when the time has arrived or the condition has been performed, it takes effect from the date of its first delivery as an *escrow*, and binds the maker whether he has parted with the possession or not (l). A deed cannot be delivered as an *escrow* to the other party to it, but only to some third person, as, for example, to the solicitor of the person making it; but it may be delivered to a solicitor acting for all parties (m); and it has been held that where there are several grantees, and one of them is a solicitor acting for himself and the other grantees, the deed may be delivered to him as an *escrow* (n).

There was formerly some doubt as to whether a deed need be signed. But with regard to deeds executed after 1925, it is provided by s. 73 of the Law of Property Act, 1925, that when an individual executes a deed he shall either sign or place his mark upon it, and sealing alone shall not be deemed sufficient.

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(h) *Xenos v. Wickham*, L. R. 2 H. L., at p. 312; 36 L. J. C. P. 313. In practice, uttering the words "I deliver this as my act and deed" is deemed equivalent to a delivery. *Id.*, at p. 320.—See also *Macedo v. Stroud*, [1922] 2 A. C., at p. 387; 91 L. J. P. C. 222.

(i) L. R. 2 H. L., at p. 323.

(k) *Id.*, at p. 312.

(l) *Id.*, at p. 323.

(m) *Millership v. Brooks*, 5 H. & N. 797; 29 L. J. Ex. 369; 120 R. R. 835; *Watkins v. Nash*, L. R. 20 Eq. 262; 44 L. J. Ch. 505.

(n) *London Freshhold and Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608; 66 L. J. Ch. 790.



In the case, however, of a corporation aggregate, it is provided by s. 74 that a deed shall be deemed to have been duly executed if its seal be affixed in the presence of and attested by its clerk, secretary or other permanent officer and a member of the board of directors or other governing body. In other cases attestation is not necessary, but in practice a deed is always attested.

*Contracts for which a deed is used.*—A contract under seal may be used for many purposes and may take various forms.

It may, for instance, be included in a conveyance of property for the purpose of imposing contractual obligations upon either party. Thus a conveyance of land may contain a covenant by the purchaser not to use it for specified purposes. Similarly a lease may, and usually does, contain covenants both by the lessor and the lessee upon various matters such as repairs.

On the other hand, in transactions that involve no transfer of property but only create contractual obligations, such as, e.g., a contract regulating the terms of a partnership or a separation between husband and wife, a deed is commonly used because of its characteristics and effects.

Again, a contract under seal may be used for a unilateral promise, as in the case of a bond.

*Bonds.*—In its simplest form a bond is merely an instrument under seal whereby one person (the *obligor*) acknowledges his liability to pay a sum of money to another person (the *obligee*). Such a bond is termed a "simple" or "single" bond.

Usually, however, a bond is "double" or "conditional", that is to say, it contains a provision that, on the happening or fulfilment of a specified condition, it shall become void. Thus A may bind himself to pay to B the sum of £1,000 subject to a condition that the bond shall be void if he pays B on a specified day the sum of £500 with interest at a specified rate. Here the real object of the bond is to secure performance of the condition and the sum which the obligor binds himself to pay is intended to be a penalty payable upon its non-performance.

Where, as in the instance given, the bond is given to secure the payment of money it is called a common money bond and at Common Law, if the condition was not fulfilled, the whole penalty was recoverable. But by 4 & 5 Anne, c. 16, it was provided that payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond although such payment be not in strict accordance with the condition.

Where a bond is given to secure the payment of money by instalments, or to secure the performance of some act other than the payment of money, it is termed a bond with a special condition. In the case of such a bond the whole penalty became due at Common Law upon any breach of the condition. But, by 8 & 9 Will. 8, c. 11, it was provided that in any action upon such a bond the plaintiff must assign (*i.e.*, set out) the breaches which had been committed by the obligor, and, although he might recover judgment for the whole penalty, execution was allowed to issue only for the damages sustained by such breaches, the judgment remaining as security for damages that might result from any further breach.

### Characteristics of Specialty Contracts.

1. *Merger*.—It is a general rule of law that a person who takes or acquires a security, remedy or cause of action of a higher nature than one which he already possesses in respect of the same subject-matter thereby merges and extinguishes his existing security, remedy or cause of action (*o*).

A contract under seal is of a higher nature than a simple contract. Accordingly, if two parties enter into a simple contract and subsequently enter into another contract under seal in respect of the same subject-matter, the simple contract is merged into the specialty contract and ceases to exist (*p*). Thus, where parties enter into a preliminary contract in writing which is afterwards reduced into a deed, the written contract is merged in the deed and extinguished, and the rights of the parties are entirely governed by the deed (*q*).

But this principle does not apply where the deed is intended to cover only a portion of the ground governed by the preliminary contract, as, *e.g.*, where a contract for the sale of land contains collateral stipulations which would have no place in and are not referred to by the deed of conveyance (*r*).

2. *Estoppel*.—Estoppel is a rule of evidence by which a party to an action may be precluded from giving evidence to contradict facts which he has previously asserted or admitted.

In the case of a deed it prevents a party thereto from denying in any action on the deed the truth of any matters which he has therein asserted or admitted (*s*). Thus, at Common Law,

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(*o*) See *Owen v. Homan*, 3 Mac. & G., at p. 407; 20 L. J. Ch. 311.

(*p*) *Price v. Moulton*, 10 C. B. 561; 20 L. J. C. P. 102; 84 R. R. 698.

(*q*) *Leggott v. Barrett*, 15 Ch. D., at p. 811; 51 L. J. Ch. 90.

(*r*) *Lawrence v. Cassel*, [1930] 2 K. B. 83; 99 L. J. K. B. 525.

(*s*) *Bowman v. Taylor*, 2 Ad. & El. 278; 4 L. J. K. B. 58.

the effect of a receipt by deed was to estop the party giving it from denying that the money was paid.

In Equity, however, a person giving a receipt under seal was not prevented from showing that the money had not been paid (t), and, by section 44 of the Judicature Act, 1925 (*ante*, p. 6), the equitable rule now prevails (u).

A receipt in writing not under seal is merely *prima facie* evidence against the person giving it, who may prove that the money was not in fact paid (x).

But a person may set up that he never executed the deed alleged to be his (*non est factum*). And he may also set up the illegality of a deed, or that it was obtained by fraud (y).

8. *Consideration*.—A deed requires no consideration (a). It is sometimes said that a deed “imports” consideration: this statement is, however, inaccurate, since the efficacy of a deed depends entirely upon its form, and, as has been seen, the validity of contracts under seal was recognised long before the doctrine of consideration came into existence: the true explanation is that the doctrine of consideration was not allowed to impair the efficacy of deeds (b).

It must, however, be noticed that, even when a deed is founded on valuable consideration, it may be void if the consideration was illegal, or if the purpose for which the deed was executed was unlawful at Common Law or by statute (c).

By s. 172 of the *Law of Property Act*, 1925, every conveyance of property made with intent to defraud creditors is voidable at the instance of any person thereby prejudiced. The term “conveyance” in this section includes every assurance of property or any interest therein by any instrument except a will, and the term “property” includes any *choses in action*, and any interest in real or personal property (d). The section does not, however, extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good

(t) *Winter v. Anson* (Lord), 3 Russ. 488; 6 L. J. (o.s.) Ch. 7; 27 R. R. 171.

(u) *Burchell v. Thompson*, [1920] 2 K. B., at p. 86; 89 L. J. K. B. 538.

(x) *Lee v. Lancashire and Yorkshire Ry.*, L. R. 6 Ch., at pp. 534, 536.

(y) *Collins v. Blantern* (1767), 1 S. L. C. 406; 2 Wilson 341. See also *Hill v. Manchester, etc., Waterworks*, 2 B. & Ad. 544; 1 L. J. K. B. 230; 36 R. R. 656.

(a) To this there is an exception in the case of contracts in restraint of trade, see *post*, Part I, Chapter IV, Section 3.

(b) But *Equity* would not enforce a promise made without consideration, even though under seal, and this rule still applies when *specific performance* of a contract is sought.

(c) See *post*, Part I, Chapter IV.

(d) *Law of Property Act*, 1925, s. 205 (1), (ii), (xx).

consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

This section re-enacts 13 Eliz. c. 5. Under that Act it was held that whether or not an intent to defraud creditors existed was in each case a question of fact (e), and that such an intent could not be inferred merely because creditors were defeated (f), though it might be inferred if the *necessary* result was to defeat creditors (g), or if any facts showed that the apparent object was to put the property out of reach of contemplated creditors (h).

By s. 42 of the *Bankruptcy Act, 1914*—

(i) Voluntary settlements are, in certain circumstances, made void against the trustee in bankruptcy of the settlor (i).

(ii) Any *covenant* made by a person in consideration of marriage for the future payment of money to his or her future wife, husband or children, or for the future settlement upon them of property in which he or she has not at the time of marriage any estate or interest, and which is not money or property in right of the settlor's wife or husband, is void against the trustee in bankruptcy if the settlor is adjudged bankrupt and the covenant has not been executed before the commencement of the bankruptcy; but the persons entitled under the covenant may claim for a dividend in the settlor's bankruptcy after all claims of creditors for valuable consideration have been satisfied.

By s. 44 of the *Bankruptcy Act, 1914*, it is provided (*inter alia*) that every transfer of property, every payment made and every *obligation* incurred by a person unable to pay his debts as they became due, in favour of any creditor, with a view to giving such creditor a preference over the other creditors, shall, if such person is adjudged bankrupt on a petition presented within six months after the date of such transfer, etc., be deemed fraudulent and void against the trustee in bankruptcy, but this shall not affect the rights of any person making title in good

(e) *Godfrey v. Poole*, 13 A. C., at p. 508.

(f) *Ex p. Mercer, re Wise*, 17 Q. B. D. 290; 55 L. J. Q. B. 558; *Re Lane-Fox, ex p. Gimblett*, [1900] 2 Q. B. 508; 69 L. J. Q. B. 722.

(g) *Freeman v. Pope*, L. R. 5 Ch. 588; 89 L. J. Ch. 689; *Re Holland*, [1902] 2 Ch., at p. 881.

(h) *Spiro v. Willows*, 8 De G. J. & S. 298; 34 L. J. Ch. 367; *Ex p. Russell re Butterworth*, 19 Ch. D. 588; 51 L. J. Ch. 521; *Re Fasey, ex p. Trustees* [1923] 2 Ch. 1; 92 L. J. Ch. 400.

(i) The word "void" in the Act must be construed as meaning "voidable"; see *Re Hart*, [1912] 3 K. B., at p. 70; 81 L. J. K. B. 663 (a decision upon s. 4(1) of the *Bankruptcy Act, 1888*, which is in the same words). Accordingly, a purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property as against the trustee in bankruptcy. 17

faith and for valuable consideration through or under a creditor of the bankrupt.

*Contracts for which a deed is required.*—A deed is necessary :

1. *By statute* in various cases, as, *e.g.*, for leases of land for more than three years and for the transfer of a British ship or any share therein.

2. *At Common Law*, for all promises made without consideration, for the contracts of corporations, and for the appointment of an agent with authority to execute a deed.

Most of these cases will be dealt with hereafter.

#### SECTION 4.—*Implied Contracts*

The term “implied contracts” is commonly applied to two classes of contracts, namely, (i) *inferred* or *tacit* contracts, where the offer or acceptance, or both, cannot be found in any express language of the parties, but is inferred from the conduct of the parties, and (ii) *implied* contracts and *quasi* contracts, where a contract is imputed by law.

The difference between these two classes of contracts is that in the first class the existence of a contract is an inference of *fact*, drawn from the circumstances of the particular case; in the second class the contractual obligation is created by the requirements of a statute, for instance, under the Sale of Goods Act, or the force of an established custom (*k*).

*Inferred (tacit) contracts.*—It has been seen that either an offer or an acceptance may be by conduct; and it has been laid down in general terms that “whenever circumstances arise in the ordinary course of business in which, if two persons were ordinarily honest and careful, the one of them would make a promise, it may properly be inferred that both of them understood that such a promise was given and accepted” (l).

The existence of a contract may often be entirely a matter of inference from the conduct of the parties. Thus, after A had for some years supplied B with coals in varying quantities and at various prices, it was agreed that a contract for its supply should be entered into between them. A contract was accordingly drawn up, but was never executed by either party. Both parties, however, for some time acted upon the terms of the

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(k) *Luxor (Eastbourne), Ltd. v. Cooper*, [1911] A. C., at p. 120. “The law will imply or the jury may infer.” *Morgan v. Racey*, 6 II. & N., at p. 276; 80 L. J. Ex. 131. “Terms to be implied are for the Court and not for the jury.” *Hall v. Brooklands Auto Racing Club* [1932] 1 K. B., at p. 218; 101 L. J. K. B. 679.

(l) *Ex p. Ford, re Chappell* 16 Q. B. D., at p. 307; 55 L. J. Q. B. 406.

draft agreement. It was held that the conduct of the parties was evidence from which an inference might, as a matter of fact, be drawn that they had waived the execution of the contract and had agreed to act upon and be bound by the terms of the draft agreement (m).

So also, though no established custom applies, an agreement may be inferred from the course of dealing between the parties. Thus, a tradesman, in yearly accounts sent to his customer had, for many years, charged him with interest on amounts which had been due for more than three years. The customer never objected to the interest, and from time to time made payments on account generally. It was held that these facts were evidence from which a jury could reasonably infer an agreement to pay interest (n).

*Implied contracts.*—An implied contract is one which is presumed by virtue of a general rule of law applicable to a particular class of cases.

There are, as will be seen later, many cases in which a contract or a term in a contract is implied either at Common Law or by statute. To give three examples :—

- (i) At Common Law an agent impliedly warrants that he has any authority which he professes to have; and if he had not in fact the authority which he assumed, he is liable to an action for breach of warranty of authority (o).
- (ii) By the *Sale of Goods Act*, 1893, various conditions and warranties are implied terms in certain contracts of sale (p).
- (iii) Under the *Law of Property Act*, 1925, various covenants may be implied in conveyances of property. Thus, when a vendor of land is expressed to convey it “as beneficial owner”, he thereby impliedly covenants, *inter alia*, that he has a good right to convey the interest which he purports to convey (q).

But, in the absence of any statutory provision, a term can, as a general rule, be implied in a contract only if it is such an obvious term that, if the parties had thought of it, they must have agreed to it, because it was necessary in a business

(m) *Brogden v. Metropolitan Ry.*, 2 A. C. 666.

(n) *Re Anglesey (Marquis of). Willmot v. Gardner*, [1901] 2 Ch. 548; 70 L. J. Ch. 810.

(o) Several other examples of implied contracts occur in the law of agency, *post*, Part III, Chapter I.

(p) *Post*, Part III, Chapter V, Section 1.

(q) *Law of Property Act*, 1925, s. 76 and Second Schedule

sense to give such efficacy to the transaction as the parties must have intended it should have (r).

In commercial contracts, however, the presumption is that the parties contract with reference to any known usages or customs which apply to the particular transaction or business (s), and such usages or customs are "tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the custom as to exclude it" (t). And this tacit incorporation of a usage may negative or vary a right or obligation which otherwise would be implied by law (u).

*Quasi contracts.*—Among implied contracts are also included quasi contracts, in which, however, the obligation, though it can be enforced as if it had a contractual origin, does not arise from any real contract, but depends upon a legal fiction. There were several classes of cases of this kind in which the use of an action of *assumpsit* was formerly possible (w), and in which an action of contract can now be brought. Of these the most important are:—

- (i) Actions on an "account stated";
- (ii) Actions for money paid by the plaintiff for the defendant at his request;
- (iii) Actions for money received by the defendant for the use of the plaintiff;

(r) *The Moorcock*, 14 P. D., at p. 68; 60 L. J. P. 73; *Fowler v. Commercial Timber Co.*, [1930] 2 K. B. 1; 99 L. J. K. B. 529. "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'" : *Shirlaw v. Southern Foundries (1926), Ltd.*, [1939] 2 K. B., at p. 227. "No matter that a contract was framed in words which, taken literally or absolutely, covered what had happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court was satisfied that the parties, as reasonable people, could not have intended that the contract should apply to the new situation, then the Court would read the words of the contract in a qualified sense. It would restrict them to the circumstances contemplated and not apply them to the un contemplated turn of events; it would do what was just and reasonable." *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1950] W. N. 338.

(s) See *Brown v. Byrne*, 8 E. & B. 703, at p. 715; 23 L. J. Q. B. 313; 97 R. R. 745; *Robinson v. Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362.

(t) *Robinson v. Mollett*, L. R. 7 H. L., at p. 811. But, as against a person who does not know of and assent to a usage, a custom cannot change the intrinsic character of a contract, though it may control its mode of performance. *Robinson v. Mollett* (*ubi supra*).

(u) *Mollett v. Robinson*, L. R. 7 C. P. 84; and see s. 55 of the Sale of Goods Act, 1893 (*post*, Part III, Chapter V, Section 1).

(r) *Ante*. pp. 18, 19.

- (iv) Actions for money due under a statute;
- (v) Actions upon a *quantum meruit*;
- (vi) Actions upon foreign judgments.

The last class will be considered later (y). With respect to the remainder :—

*Accounts stated.*—There are two forms of account stated (z). It may take the form of a mere acknowledgment of a debt, from which a promise to pay the debt is implied. It is then merely *prima facie* evidence of a debt, and the defendant may prove that no debt in fact existed. But there is a second form also which has been called a “real account stated”, when an account has been drawn up containing items on each side and showing a balance due to the plaintiff. If the defendant has signed such an account or has, either expressly or by conduct, admitted it to the plaintiff (a), a promise by him to pay the balance is implied, the consideration being the discharge of the other items by set-off (b). It is not necessary in order to make out a real account stated, that the debts should be debts *in præsenti*, or legal debts : the account may contain contingent or equitable debts, or debts barred by a Statute of Limitation, or debts unenforceable by action for want of a memorandum in writing. But, even in a case of this form of account stated, the Court may inquire into the consideration and the claim may fail, either wholly or as to a particular item, if there was no consideration or an illegal or immoral consideration, or if, on any other ground, the defendant, if he had actually paid the item in question, could have recovered back the money paid (c).

*Money paid for the defendant at his request.*—A person who voluntarily and without any request or compulsion pays money on behalf of another does not thereby acquire any right of action against that other (d). But an action for “money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request” lies whenever the plaintiff has paid money to a third person at the request, or with the express or implied authority of the defendant, and with an express or

(y) *Post*, Section 5.

(z) See *Siqueira v. Noronha*, [1934] A. C., at p. 337; 103 L. J. P. C. 63.

(a) *Wray v. Milestone*, 5 M. & W. 21; 9 L. J. Ex. 39. See also Bullen & Leake (3rd ed.), pp. 52, 53.

(b) *Laycock v. Pickles*, 1 B. & S. 497; 33 L. J. Q. B. 43.

(c) See Bullen & Leake (*ubi supra*); *Laycock v. Pickles* (*ubi supra*); *Evans & Co. v. Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 583.

(d) *Pownall v. Ferrand*, 6 B. & C., at p. 441; *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P., at p. 43; 37 L. J. C. P. 38. *Re Cleadon Trust, Ltd.*, [1909] Ch. 222, 102 T. T. Ch. 21 (reviewing the authorities).



implied undertaking to repay it (e). Thus, where an agent, such as a stockbroker, is employed to do anything in the ordinary course of his business as such, his principal impliedly authorises him to make such payments as are usual and necessary in the course of his employment (f).

A request is implied whenever "the plaintiff has been compelled by law to pay, or, being compellable by law, has paid, money which the defendant was ultimately liable to pay" (g), as, for instance, where the plaintiff's goods have been lawfully seized for the debts of the defendant and the plaintiff has paid money to redeem them (h), or where the plaintiff has been compelled to pay money in abating a nuisance for the abatement of which the defendant was legally responsible (i). Upon the same principle one of several co-debtors, or co-sureties, who has paid the whole debt can use this form of action to recover contribution from the other debtors or sureties (k).

*Money received to the use of the plaintiff.*—An action for "money payable by the defendant for money received by the defendant to the use of the plaintiff" lay, at Common Law, whenever the defendant had received money under such circumstances that he ought to be treated as holding it to the use of the plaintiff, who was accordingly allowed to bring an action of *indebitatus assumpsit* based upon an imputed promise to pay.

"The story starts with the action of debt, which was not necessarily based upon the existence of a contract, for it covered claims to recover sums due for customary dues, penalties for breaches of by-laws and the like. The action of debt had its drawbacks . . . . There followed the application of the action on the case of *assumpsit* to debt." The defendant being indebted then promised. "At first there must be an express promise; then the Courts implied a promise from an executory contract . . . . Then the action was allowed in respect of cases where there was no contract, executory or otherwise, as in the case where debt would have lain for customary fees and the like; and by a final and somewhat forced application to cases where the defendant

(e) *Brittain v. Lloyd*, 14 M. & W. 762; 15 L. J. Ex. 48. See also Bullen & Leake, (3rd ed.), p. 42.

(f) *Sutton v. Tatham*, 10 Ad. & El. 27; 8 L. J. Q. B. 210.

(g) *Moule v. Garrett*, L. R. 7 Ex. at p. 104; 41 L. J. Ex. 12, and see Bullen & Leake, (3rd ed.), p. 48.

(h) *Exall v. Partridge*, 8 T. R. 656; *Edmunds v. Wallingford*, 14 Q. B. D. 811; 54 L. J. Q. B. 305.

(i) *Gebhardt v. Saunders*, [1892] 2 Q. B. 452.

(k) *Kemp v. Finden*, 12 M. & W. 421; 13 L. J. Ex. 137; *Batard v. Hawes*, 2 F. & B. 287; 22 L. J. Q. B. 448.

had received money of the plaintiff to which he was not entitled. These included cases where the plaintiff had intentionally paid money to the defendant, *e.g.*, claims for money paid on a consideration that wholly failed and money paid under a mistake: cases where the plaintiff had been deceived into paying money, cases where money had been extorted from the plaintiff by threats or duress of goods . . . and finally cases . . . where the defendant had been wrongfully in possession of the plaintiff's goods, had sold them and was in possession of the proceeds. Now to find a basis for the actions in any actual contract whether express or to be implied from the conduct of the parties was in many of the instances given obviously impossible . . . . Nevertheless, if a man so wronged was to recover the money in the hands of the wrongdoer . . . it was necessary to create a fictitious contract: *for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other.* The action of *indebitatus assumpsit* for money had and received to the use of the plaintiff in the cases I have enumerated was therefore supported by the imputation by the Court to the defendant to a promise to repay . . . . The law, in order to do justice, imputed to the wrongdoer a promise which alone, as forms of action then existed, could give the injured person a reasonable remedy" (l).

In the case of *Sinclair v. Brougham* (m) it was, however, pointed out that this fiction can only be set up if such a contract would be valid if it really existed, and not where substantive law renders it invalid. Where, therefore, money is lent to a company under a contract which is *ultra vires* the company, the lenders cannot recover their money on the ground that it is money had and received by the company to their use, because the implied contract on which the action for money had and received to their use would be based would be precisely that promise which the company could not lawfully make. So also, where an infant obtains a loan by fraudulently misrepresenting his age, an action for money had and received cannot be brought against him, because his express promise to pay would by the Infants Relief Act, 1874, be absolutely void (n).

(l) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1911] A. C., at pp. 27, 28; 109 L. J. K. B. 119. "The writ of *indebitatus assumpsit* involved at least two averments, the debt or obligation and the *assumpsit*. The former was the basis of the claim and was the real cause of action. The latter was merely fictitious and could not be traversed, but was necessary to enable the convenient and liberal form of action to be used in such cases": *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour, Ltd.*, [1943] A. C., at p. 63.

(m) [1914] A. C. 398; 83 L. J. Ch. 465.

In the case of *Sinclair v. Brougham* it was also stated that the action for money had and received cannot now be extended beyond the principles illustrated in the decided cases and that it is very hard to reduce to one formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use.

In the *Fibrosa Case* (o) it was, however, said by Lord Wright that "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or tort and are now recognised to fall within a third category of the Common Law which has been called quasi-contract or restitution".

The principal classes of cases in which the action for money had and received can be brought are (p)—

- (i) For money paid to the defendant on a consideration which has wholly failed (q).
- (ii) For money so paid under a mistake of fact (r).
- (iii) For money so paid to recover property unlawfully seized or detained (s). As a general rule also, whenever the defendant has wrongfully obtained the money of the plaintiff, or has wrongfully obtained the goods of the plaintiff and converted them into money, the plaintiff may claim the money as received to his use (t).
- (iv) For money paid by the plaintiff to his agent or to a stakeholder and retained by him after his authority to hold it or deal with it has been revoked (u).
- (v) For money paid by a third person to the agent of the

(o) [1913] A. C., at p. 61.

(p) See Bullen & Leake (3rd ed.), pp. 44-51.

(q) See *ante*, p. 51.

(r) See *post*, Chapter II, Section 2, Sub-section 2.

(s) See *Atlee v. Backhouse*, 3 M. & W. 633; 137 R. R. 98.

(t) *Holt v. Ely*, 1 R. & B. 795; 93 R. R. 398 (money); *Oughton v. Seppings*, 1 B. & Ad. 211; 8 L. J. K. B. 393 (goods). See also Bullen & Leake (3rd ed.), pp. 47, 48. In the case of goods the plaintiff may alternatively claim the value of the goods in an action for goods sold and delivered: *Russell v. Bell*, 10 M. & W. 310; 62 R. R. 399. In such cases it was formerly said that there was a waiver of the tort but it has recently been pointed out that this expression is inaccurate. The tort is not waived in the sense of being affirmed as rightful but the injured person has alternative remedies between which he may elect until he has obtained judgment for one of them. *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A. C., at p. 27.

(u) *Fletcher v. Marshall*, 13 M. & W. 755 (agent); *Sadler v. Smith*, L. R. 5 Q. B. 40; 39 L. J. Q. B. 17 (stakeholder).

plaintiff on behalf of the plaintiff (x) or in such circumstances that the agent is bound to account for it to the plaintiff, as, e.g., in the case of improper profits made or a bribe received by the agent (y).

*Quantum meruit*.—An action upon *quantum meruit* is an action based upon an implied obligation to pay reasonable remuneration for services rendered or goods supplied upon request.

It will lie in many cases, e.g.,

- (i) Where work has been done by the plaintiff for the defendant under an agreement which is unenforceable for want of compliance with s. 4 of the Statute of Frauds (z).
- (ii) In certain cases where a contract has been partially performed by the plaintiff (a).
- (iii) Where services are rendered or goods are supplied on the faith of an agreement which is supposed to be but is not a binding contract.

Thus, in *Craven Ellis v. Canons, Ltd.* (b), a contract was executed, purporting to be between the defendant company and the plaintiff, stating the terms under which the plaintiff was to act as managing director of the company. The contract was in fact made between directors who had no authority to make it and one of themselves, who had notice of their want of authority. It was accordingly a nullity. Held, nevertheless, that the plaintiff could recover, on a *quantum meruit*, for services which, in accordance with the agreement, were rendered by him to the company and accepted by the company.

*Money due under a statute*.—Whenever a statute creates a duty or obligation to pay money, an action will lie for its recovery, unless the statute contains some provision to the contrary (c). Such an action was originally an action of debt (d) and the obligation was therefore considered as of a quasi-contractual character. For the purposes of the Statutes of

(x) *Harsant v. Blaine*, 56 L. J. Q. B. 511.

(y) *Grant v. Gold, etc., Syndicate*, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150.

(z) *Ante*, p. 53.

(a) *Planché v. Colburn*, 8 Bing. 14; 1 L. J. C. P. 7; *Appleby v. Myers*, L. R. 2 C. P., at pp. 659, 660; 36 L. J. C. P. 651. This class of cases will be dealt with later.

(b) [1936] 2 K. B. 403; 105 L. J. K. B. 767.

(c) *Shepherd v. Hills*, 11 M. & W. 55.

(d) *See* *Ante*, p. 53.

Limitation a debt due under a statute was formerly considered as a debt by specialty (e).

### SECTION 5.—*Contracts of Record*

The term "contract of record" is applied to (i) recognisances taken and enrolled in English Courts of Record, and (ii) judgments of such Courts.

A Court of Record is a Court of which the proceedings are enrolled or recorded and whose records are indisputable evidence of its proceedings (f). The essential characteristic of a Court of Record is the power to fine or imprison, and every Court to which such power belongs, either at Common Law or by statute, is thereby constituted a Court of Record (g). The High Court of Justice and the Court of Appeal (h), the Court of Criminal Appeal (i), the Privy Council (k), and the House of Lords (l), are superior Courts of Record. The County Court (m) the Courts of Quarter Sessions (n), Courts of summary jurisdiction (o), the Coroner's Court (p), and numerous local Courts established by prescription, charter or statute, are inferior Courts of Record (q).

**Recognisances.**—A recognisance is an instrument executed before a Court or officer authorised to take it and binding the person who executes it to perform some condition therein specified.

(e) *Shepherd v. Hills* (*ubi supra*); *Gutsell v. Reeve*, [1936] 1 K. B. 272; 105 L. J. K. B. 213; *Pratt v. Cook, Son & Co.*, [1940] A. C. 437; 107 L. J. K. B. 478.

(f) Black. Comm. ii, 456; iii, 24.

(g) *Groenvelt v. Burwell*, 1 Ld. Raym. 454; *Kemp v. Neville*, 10 C. B. (N.S.), at p. 552; 31 L. J. Ch. 158; 128 R. R. 815.

(h) Judicature Act, 1873, ss. 16, 18; Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18, 26.

(i) Criminal Appeal Act, 1907, s. 1 (7).

(k) The Privy Council is the descendant of the King's Council from which it derives its powers, now exercised by a Judicial Committee constituted in 1833.

(l) The appellate jurisdiction of the House of Lords dates from the thirteenth century and arose out of the exercise by the Lords of the judicial functions of the King in Council in Parliament.

(m) County Courts Act, 1846, s. 3; 1888, s. 5; 1934, s. 1.

(n) *R. v. Clement*, 4 B. & Ad., at p. 233; 23 R. R. 260.

(o) *Basten v. Carew*, 3 B. & C. 649.

(p) *Thomas v. Churton*, 2 B. & S. 475; 31 L. J. Q. B. 189; 6 L. T. 320; 127 R. R. 443.

(q) Note that inferior Courts of Record can commit for contempt only when it is committed *in facie curiæ*: see *R. v. Lefroy*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 23 L. T. 132. As to County Courts see, however, s. 139 of the County Courts Act, 1934.

In form it is similar to a bond and consists of an acknowledgment of a debt to the King, with a provision that if the person entering into the recognisance, termed the *recognisor*, performs the specified condition, the recognisance shall be void. When the recognisance is enrolled in a Court of Record it constitutes a debt of record due to the Crown.

Recognisances are commonly used in criminal proceedings, as, for instance, to bind a person who is convicted of an offence to come up for judgment when called upon, or to bind a person who is admitted to bail to appear for trial at a specified time and place. The following is a short form of such a recognisance:—

Recognisance to appear at Assizes

Be it remembered that on the — day of — 19— [*insert names and descriptions of defendant and bail*] come before me — one of His Majesty's Justices of the Peace in and for the county of —, and acknowledge to owe Our Sovereign Lord the King the several sums following (that is to say): The said — the sum of — pounds, and the said — the sum of — pounds, and the said — the sum of — pounds each, to be levied upon their several goods and chattels, lands and tenements, to His Majesty's use, upon condition that if the said [*defendant*] shall personally appear at the next assizes and sessions of oyer and terminer and general gaol delivery, to be holden in and for the county of —, and then and there answer to all such matters and things as on His Majesty's behalf shall then and there be objected against him, and so from day to day, and not depart that Court without leave, then this recognisance to be void, or else to remain in full force.

Taken and acknowledged the day  
and year first aforesaid.

Before me  
[*Signed, etc.*]

Such a recognisance, when enrolled in a Court of Record, constitutes a debt of record due to the Crown, and, upon non-fulfilment of the condition, the recognisance may be forfeited and estreated, upon which the person bound and his sureties (if any) will become absolute debtors to the Crown for the sum named, which will then be levied by the sheriff (r).

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(r) See *Re Nottingham Corporation*, [1897] 2 Q. B. 502; 65 L. J. Q. B. 888. The term "estreat" meant originally an extract or copy of some record of a Court. It was formerly the duty of the clerks of all the King's Courts to make up an estreat roll showing all fines, etc., imposed by the Courts and to return it to the Exchequer. For the various statutes and rules now governing the enforcement of recognisances see Archbold's Criminal Pleadings. Special provisions are also made by the Summary Jurisdiction Act, 1879, s. 9 (as amended by Schedule 9 of the Criminal Justice Act, 1948) for the enforcement of recognisances entered into before a Court of Summary Jurisdiction.

Before 1888 a recognisance might also be used in some personal actions to ensure the appearance of the defendant at the trial, for, without his appearance, no final judgment could be obtained against him. In these cases the recognisance was given to the sheriff and upon its breach was assigned to the plaintiff, who might bring an action of debt upon it.

**Judgments.**—A judgment is included among contracts because under the old system of pleading it would give rise to an action of contract.

It was from an early date a settled rule of English law that the judgment of a Court of Record, ordering a sum of money to be paid, created a *debt of record*, for which an action of debt was maintainable. The principle upon which this rule depended was that, when a Court of competent jurisdiction adjudges a sum to be paid, an obligation to pay is thereby created. This principle was applied not only to the judgments of English Courts of Record but to those of English Courts which were not Courts of Record and of foreign and colonial Courts, but the judgments of all Courts other than English Courts of Record created only simple contract debts (s).

Under the old procedure it sometimes gave an advantage to a plaintiff to bring an action on a judgment for a debt under £20 and costs in order to obtain judgment for a sum exceeding £20 upon which he might take the defendant in execution (t). But at the present time it is unnecessary and improper to bring an action upon the judgment of an English Court of Record because it can at once be enforced by execution (u) and by proceedings under the *Debtors Act*, 1869, by which a person who makes default in payment of a judgment debt may, upon a judgment summons, be committed to prison if, since the date of the judgment, he has had the means to pay and has refused or neglected to pay (x).

Moreover, no action can be brought in the county court upon a High Court judgment (y), nor can an action be brought in any Court upon a county court judgment or order other than an order made in bankruptcy.

(s) *Williams v. Jones*, 13 M. & W. 628; 11 L. J. Ex. 145; 67 R. R. 767; *Smith v. Nicolls*, 5 Bing. N. C. 208; 8 L. J. C. P. 92; 50 R. R. 658. Scottish and Irish Courts are for this purpose foreign Courts.

(t) Bullen & Leake (3rd ed.), p. 193.

(u) *Bann v. Dalziel*, 3 C. & P. 376; *Prichett v. English & Colonial Syndicate*, [1899] 2 Q. B., at p. 435; 68 L. J. Q. B. 801.

(x) *Debtors Act*, 1869, s. 4.

(y) *County Courts Act*, 1931, s. 68.

# The characteristics of judgments of English Courts of Record.

1. The record, while it stands, is conclusive evidence of the matters recorded and admits of no "averment, plea, or proof to the contrary" (z). But a person against whom a record is set up may deny the existence of the alleged record (a). And a judgment may be impeached on the ground that it was obtained by fraud; but for this purpose a subsequent action must be brought in a Court of first instance in which the alleged fraud must be treated as a distinct issue, apart from any of the matters originally tried (b).

2. The doctrine of consideration is not applicable to them. The reason for this is apparent from the short account which has already been given of the origin of the doctrine of consideration.

In bankruptcy proceedings, however, though a judgment is *prima facie* evidence of a debt, the Court may in two cases inquire into the consideration for a judgment. Firstly, when the petition is founded upon the non-payment of a judgment debt, the Court may, upon a *prima facie* case being shown (c), inquire into the consideration, in order to determine whether there was a real debt in respect of which a judgment ought to have obtained (d), or of such a kind that a receiving order ought to be made (e). Secondly, at the instance of the trustee in bankruptcy, the Court may, upon the question of the proof of a judgment debt, inquire into the consideration therefor, in order to prevent the right of *bona fide* creditors to an equal distribution of the assets from being prejudiced by a judgment which for any reason ought not to have been obtained (f), such as a judgment obtained by fraud

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(z) Co. Inst. 1, 260; *R. v. Carlile*, 2 B. & Ad. 362; 9 L. J. K. B. 250; *Basien v. Carew*, 3 B. & C. 649; 3 L. J. K. B. 111; 27 R. R. 453; *Kemp v. Neville*, 10 C. B. (n.s.) 523; 31 L. J. C. P. 158; 128 R. R. 815.

(a) This was known as the plea of *nul tiel record*. See Bullen & Leake (3rd ed.), p. 621, and *R. v. Carlile* (*ubi supra*).

(b) *Flower v. Lloyd*, 10 Ch. D. 327; *Jonesco v. Beard*, [1930] A. C. 298; 99 L. J. Ch. 228. Where a British subject has by fraud obtained a judgment in a foreign Court an English Court may grant an injunction restraining its enforcement: *Ellerman Lines, Ltd. v. Read*, [1928] 2 K. B. 144; 97 L. J. K. B. 366.

(c) *Re A Debtor*, [1929] 1 Ch. 125; 97 L. J. Ch. 167.

(d) *Ex p. Kibble, re Onslow*, L. R. 10 Ch. 373; 44 L. J. Bk. 63; *Ex p. Lennox*, 16 Q. B. D. 315; 55 L. J. Q. B. 45. See also *Re A Debtor*, [1903] 1 K. B. 705; 72 L. J. K. B. 333; *Re Gooch*, [1921] 2 K. B. 593.

(e) By s. 5 (3) of the Bankruptcy Act, 1914, "if the Court is not satisfied with the proof of the petitioning creditor's debt . . . or is satisfied . . . that for other sufficient cause no order ought to be made, the Court may dismiss the petition".

(f) *Ex p. Chatterton, re Van Laun*, [1907] 2 K. B. 23; 76 L. J. K. B. 142.



or collusion (g) or for a debt which could not be proved in the bankruptcy, as, for example, a gambling debt (h).

8. By s. 195 of the *Law of Property Act, 1925*, replacing earlier enactments of similar effect, a judgment entered up in the Supreme Court (whether before or after the commencement of the Act) operates, *as soon as a writ or order for enforcing it is registered at the Land Registry*, as an equitable charge on every estate or interest (whether legal or equitable) on all land to or over which the judgment debtor at the date of the entry or at any time thereafter is or becomes: (i) beneficially entitled; or (ii) entitled to exercise a power of disposition for his own benefit without the assent of any other person.

4. A judgment creates a *merger* of the obligation on which it is founded, unless that obligation arises under another debt of record. Accordingly, if judgment is recovered in an action upon a simple contract or specialty contract, the original cause of action is merged in the judgment (i).

So, where a mortgage deed contained a covenant by the mortgagor to pay the principal sum at a fixed date with interest at 5 per cent. per annum, and further covenant to pay interest at 5 per cent. per annum upon so much of the principal as should remain unpaid after that date, and the mortgagee sued for the mortgage money and obtained judgment, it was held that the covenant to pay interest after the date for repayment of the principal merged in the judgment, and that, on the bankruptcy of the mortgagor, the mortgagee was, as from the date of the judgment, entitled only to prove for interest on the judgment debt at 4 per cent., and not at the 5 per cent. under the covenant (k).

But a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; as, *e.g.*, a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment (l). Moreover, it is only the personal remedy that is merged in the judgment. Accordingly, although judgment has been recovered in an action for the debt, the mortgagor cannot redeem without paying the interest due under the covenant (m).

The doctrine of merger by judgment applies not only to debts

(g) *Ex p. Lennox* (*ubi supra*).

(h) *Ex p. Seaton, re Deerpurst*, 60 L. J. Q. B. 411. See also *Ex p. Anderson, re Tollemache*, 14 Q. B. D. 606; 54 L. J. Q. B. 383.

(i) Bullen & Leake (3rd ed.), pp. 624, 651, *King v. Hoare*, 13 M. & W. 494.

(k) *Ex p. Fewings, re Sneyd*, 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109.

(l) *Id.*, at p. 355.

(m) *Economic Life Assurance Co. v. Osborne*, [1902] A. C. 147; 71 L. J. P. C. 34.

but to any breach of contract, wrong, or other cause of action, the principle being that the cause of action is changed into matter of record and the previous remedies merge into the higher remedy of execution available under the judgment (n).

The doctrine, however, applies only to English Courts of Record: the judgment of an English Court which is not a Court of Record creates merely a simple contract debt.

5. *A judgment is a bar to further proceedings on the same cause of action, and creates an estoppel.*—Since the effect of merger is to destroy the original cause of action, the defendant, if sued again by the same plaintiff upon the same cause of action, may set up the defence of *res judicata* as a bar to the second action.

But this principle applies only where the cause of action in the second action is the same as in the first action. If, therefore, A recovers judgment either in contract or in tort against B, who is under no legal liability towards him and the judgment is not satisfied, A is not precluded from subsequently suing C, who is the person really liable. In such a case there is no merger, for in the first action there was no cause of action and therefore nothing that could merge (o).

Independently, however, of merger, it is a rule of law that "*Nemo debet bis vexari pro eadem causa*". Accordingly the defence of *res judicata* is not limited to judgments of English Courts of Record (p), nor to cases in which merger has occurred because the matter actually and directly in dispute has been adjudicated upon, but applies to any final (q) decision (r) of any tribunal of competent jurisdiction whether English or (subject to certain qualifications (s)) foreign, and is available whenever there has been such a decision upon any cause of action, and the plaintiff in whose favour it was given seeks to put forward in a

(n) *Smith v. Nicolls*, 5 Bing. N. C. 208; 8 L. J. C. P. 92; 50 R. R. 658; *King v. Hoare*, 18 M. & W., at p. 504; 14 L. J. Ex. 29; 67 R. R. 694; and as to torts, see *Ruckland v. Johnson*, 15 C. B. 145; 23 L. J. C. P. 204; 100 R. R. 280.

(o) *Isaacs v. Salbstein*, [1916] 2 K. B. 139; 85 L. J. K. B. 1433; *Freshwater v. Bulmer Rayon Co.*, [1938] 1 Ch. 182; [1938] A. C. 661.

(p) *Barber v. Lamb*, 8 C. B. (n.s.) 95; 29 L. J. C. P. 234; *Re May*, 28 Ch. D., at p. 518; 54 L. J. Ch. 388.

(q) This term does not mean a judgment which is not open to appeal, but merely a judgment which is "final" as opposed to "interlocutory": *Huntly (Marchioness) v. Gaskell*, [1906] 2 Ch. 656; 75 L. J. Ch. 66; *Beatty v. Beatty*, [1924] 1 K. B. 807; 93 L. J. K. B. 750.

(r) This includes an order made by consent; *Kinch v. Walcott*, [1929] A. C. 482; 98 L. J. P. C. 129.

(s) *Post*, pp. 89, 90.

second action upon the same cause of action a claim which it was open to him to put forward in the first action (t).

Thus, in *Conquer v. Boot*, A contracted to build a bungalow for B "in a good and workmanlike manner". B brought an action against A, alleging a number of matters which constituted a breach of a contract to build in a good and workmanlike manner, and recovered £24 damages. Subsequently he brought a second action against A on the same contract, alleging a number of other matters of similar character, of which he was ignorant at the time of the first action. It was held that there was one entire contract, namely, to complete the bungalow in a good and workmanlike manner and one breach of the contract, namely, the failure to hand it over in a proper condition. Hence the cause of action was the same in both actions, and the defendant could set up the plea of *res judicata* in answer to the second action (u).

Two actions may, however, be brought upon the same facts if they give rise to distinct causes of action (x). The principal test to apply in order to ascertain whether a judgment recovered in one action enables the defendant to set up the defence of *res judicata* as a bar to a subsequent action against him by the same plaintiff is whether the same evidence would prove the plaintiff's case in the two actions (y). Thus a plaintiff who has recovered damages from injury to his person caused by the defendant's negligence cannot in a subsequent action recover further damages for injury to his person (a); nor can a plaintiff who has obtained judgment for the delivery up of property maintain a subsequent action for damages for its detention, because he might have obtained this relief in the first action (b): but a plaintiff who has recovered damages for injury to his *property* caused by the defendant's negligence may bring a second action for injury to his *person* caused by the same negligence because damage to the person creates a cause of action which is different from that created by damage to property, and which would be proved and resisted by different evidence (c).

(t) *Nelson v. Couch*, 15 C. B. (N.S.) at pp. 108, 109; 33 L. J. C. P. 46; *Ord v. Ord* [1928] 2 K. B., at p. 439; 92 L. J. K. B. 859; *Green v. Weatherill*. [1929] 2 Ch. 213; 98 L. J. Ch. 369.

(u) [1928] 2 K. B. 386; 97 L. J. K. B. 452. But there may be in one contract several promises the breach of either of which is a separate cause of action, as, e.g., where there are separate promises to be performed at different times and in different events: [1928] 2 K. B., at p. 314; *Bristowe v. Fairclough*, 1 Man. & G. 148; 9 L. J. C. P. 215.

(x) *Brunsdon v. Humphrey*, 14 Q. B. D. 141; 53 L. J. Q. B. 476.

(y) *Id.*, and see *Ord v. Ord*, [1928] 2 K. B., at p. 432; 92 L. J. K. B. 859.

(a) *Brunsdon v. Humphrey* (*ubi supra*).

(b) *Serrao v. Noel*, 15 Q. B. D. 549.

(c) *Brunsdon v. Humphrey* (*ubi supra*).

Judgment *against* a plaintiff does not, strictly speaking, constitute a bar to a further action by him against the same defendant, but operates only by way of estoppel and only when the judgment was on grounds constituting a defence to the second action (d). In modern practice, however, this technical distinction is, in most cases, of no importance, and, whenever a cause of action has been adjudicated upon by a Court of competent jurisdiction and either party seeks to bring a fresh action upon any question which in substance has become *res judicata* by such adjudication, the action will be dismissed as frivolous and vexatious, for it is not competent for a Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal (e).

*Estoppel*, as already pointed out (f), is a rule of evidence by which a person is precluded from contesting certain facts. In the case of judgments it operates to prevent parties to an action from re-asserting in a subsequent action an issue which was decided in the first action (g).

**Foreign judgments.**—It may be convenient to consider here the principal effects of foreign judgments.

At Common Law a foreign judgment created a simple contract debt enforceable by an action of debt or *indebitatus assumpsit* (h). It created no merger, so that the creditor might sue either upon the original debt or upon the judgment (i). The defendant might, however, set up the defence that the judgment had been obtained by fraud (k) and he might also set up other defences which could not be raised in proceedings upon the judgment of an English Court of Record, as, *e.g.*, on the ground that its enforcement was contrary to English public policy (l), or that the proceedings in

(d) Bullen & Leake (3rd ed.), p. 575; *Vooght v. Winch*, 2 B. & Ald., at p. 670; 21 R. R. 446; *Newington v. Levy*, L. R. 6 C. P. 180; 40 L. J. C. P. 29; *Moss v. Anglo-Egyptian Navigation Co.*, L. R. 1 Ch. 108; 35 L. J. Ch. 179.

(e) *Badar Bee v. Habib Merican Noordin*, [1909] A. C., at p. 628; 68 L. J. P. C. 161. For illustrations, see *MacDougall v. Knight*, 25 Q. B. D. 1; 59 L. J. Q. B. 517; *Stephenson v. Garnett*, [1898] 1 Q. B. 677; 67 L. J. Q. B. 477; *Mackenzie Kennedy v. Air Council*, [1927] 2 K. B., at p. 528; 96 L. J. K. B. 1145.

(f) *Ante*, p. 71.

(g) See *Marginson v. Blackburn Borough Council*, [1939] 2 K. B. 426; 108 L. J. K. B. 568.

(h) *Walker v. Witter*, 1 Dougl. 1.

(i) *Hall v. Odber*, 11 East 118; 10 R. R. 443; *Smith v. Nicolls*, 5 Bing. N. C. 208; 8 L. J. C. P. 92; 50 R. R. 658.

(k) *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1; *Vadala v. Lawes*, 25 Q. B. D. 219.

(l) See *Huntington v. Attrill*, [1893] A. C. 150; 62 L. J. P. C. 44.

which it was obtained were contrary to natural justice (*m*), or that the Court in which it was obtained had no jurisdiction over the defendant (*n*). But, if unimpeachable, it had the same effect as an English judgment with regard to estoppel and the defence of *res judicata* (*o*).

It could not, however, at Common Law be enforced by execution. But, by the *Judgments Extension Act*, 1868, and the *Inferior Judgments Extension Act*, 1882, it was provided that a judgment for any "debt, damages or costs" in any superior or inferior Court of Scotland or Ireland (*p*) might be registered and enforced by execution in England; and, by the *Administration of Justice Act*, 1920, and the *Foreign Judgments (Reciprocal Enforcement) Act*, 1933, and an Order in Council of 1933, a judgment of the superior Courts of His Majesty's Dominions outside the United Kingdom or of protectorates or mandated territories, whereby any sum of money is made payable may, provided that it is not impeachable on certain specified grounds (*q*), be registered and enforced by execution in England. The provisions of the latter Act may also, by Order in Council, be extended to the judgments of foreign countries granting reciprocal treatment and such judgments will not then be enforceable in any other manner (*r*). And, by s. 8 of the Act of 1933, a foreign judgment to which the Act applies, whether or not it is registered or could be registered in England, shall be recognised in any Court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

Except where special reference is made to contracts of record the remainder of this Part of this book relates only to simple contracts and contracts under seal.

### SECTION 6.—*Construction of Documents*

As we have already seen, no contract can exist unless all its material terms can be determined. But even though all the

(*m*) *Pemberton v. Hughes*, [1899] 1 Ch. 781; 68 L. J. Ch. 281.

(*n*) See *Rousillon v. Rousillon*, 14 Ch. D. 351; 49 L. J. Ch. 339; *Emanuel v. Symon*, [1908] 1 K. B. 302; 77 L. J. K. B. 190.

(*o*) See *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

(*p*) The term "Ireland" now includes only Northern Ireland: see *Wakely v. Triumph Cycle Co.*, [1924] 1 K. B. 214; 93 L. J. K. B. 331.

(*q*) As, e.g. if the foreign Court acted without jurisdiction over the defendant or if the judgment was obtained by fraud or its enforcement would be contrary to public policy. See s. 9 of the Act of 1920 and s. 4 of the Act of 1933.

(*r*) By Orders in Council it has been extended to France, Belgium, British India and British Burma.

material terms are not expressed there may be a contract if the Court can determine them either by interpretation of the language used by the parties or by holding that the missing details are such as the law will imply (s). Accordingly, in the case of commercial contracts whose performance will extend over a number of years and will involve the future working out of numerous details, if it is clear that the parties intended to make a binding contract, there may be a contract, although some material details relating to its future performance are not settled, provided that they can be settled by the Court as a matter of construction or by applying an implication of law (t).

Thus, in *Hillas & Co., Ltd. v. Arcos & Co., Ltd.* (u), the plaintiffs agreed to buy from the defendants, upon certain terms and conditions set out in the agreement, 22,000 standards of Russian softwood "of fair specification" during the season 1930. The agreement contained a clause that they should also have the option of entering into a contract with the defendants "for the purchase of 100,000 standards for delivery during 1931". This option was exercised at the end of 1930. Held, by the House of Lords (i) that the option clause was not merely an agreement to enter into a contract in the future, but that on the acceptance of the option there was a binding contract; (ii) that this contract was subject to the terms and conditions governing the sale of the first 22,000 standards so far as they were applicable, and free from uncertainty; (iii) that, upon the context, the words "100,000 standards" meant 100,000 standards of Russian softwood of fair specification; (iv) that there was no fatal uncertainty in the words "of fair specification", because, if the parties disagreed, the standard of reasonableness could be applied by the Court; (v) that there was no fatal uncertainty merely because no express provision was made with regard to some details such as shipping dates, for in this respect also the implication of reasonableness could be applied by the Court (x).

Again, in *Foley v. Classique Coaches, Ltd.* (y), the plaintiff sold land to the defendants for use in their business as motor coach proprietors. It was a term of the sale that the defendants should enter into an agreement to buy their petrol from the plaintiff. An agreement was accordingly executed which provided that the defendants should buy from the plaintiff all the petrol required for their business "at a price to be agreed by the parties in writing and from time to time". The agreement contained a clause that any dispute arising on its construction or subject-matter should be referred to arbitration. Held, (i) that the agreement was intended to be a binding contract since it formed part of the consideration for the sale of the land; (ii) that, in the absence of any express agreement

(s) See *Stimson v. Grey*, [1929] 1 Ch. 629; 98 L. J. Ch. 315.

(t) See *Hillas & Co., Ltd. v. Arcos, Ltd.*, 38 Com. Cas. 353; 147 L. T. 503.

(u) (*Ubi supra*).

(x) Contrast the case of *Scammell & Nephew, Ltd. v. Ouston* (*ante*, p. 37). See [1941] A. C., at pp 272, 273.

(y) [1934] 2 K. B. 1; 103 L. J. K. B. 550.

as to the price of the petrol, there was an implication of law that it should be supplied at a reasonable price and that any dispute as to its reasonableness must be settled by arbitration.

The following are the principal rules governing the construction of documents :—

1. *The construction of documents is, as a general rule, for the Court.*—But, if there is a question whether a word was used in a sense peculiar to a trade, business, or place, the jury must first say whether the parties used it in that particular sense; the meaning of technical words must also be left to the jury (a). Accordingly, if a contract is wholly in writing, its effect must be determined entirely by the Court, unless there is any evidence that its words have some special or technical meaning (b). But if the contract is oral, or partly oral and partly in writing, its effect as a whole becomes a question for the jury, which must, however, take from the Court the construction of any documents (c).

2. *The proper law to apply in construing a contract is the law by which the parties intended or must be presumed to have intended it to be governed (d).*—The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the Court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference as to the intention of the parties to apply a particular law (e).

Thus there is a presumption that a contract is to be construed according to the law of the country where it was made, unless a contrary intention appears (f). On the same principle, in

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(a) *Simpson v. Margitson*, 11 Q. B., at p. 31; 17 L. J. Q. B. 81; 75 B. R. 278. Cited and approved in *Bruner v. Moore*, [1904] 1 Ch. 305; 78 L. J. Ch. 377.

(b) *Bouris v. Shand*, 2 A. C. 155; 16 L. J. Q. B. 561; *Morrell v. Frith*, 3 M. & W. 102; 7 L. J. Ex. 172; 19 R. R. 659.

(c) *Bolckow v. Seymour*, 17 C. B. (N.S.) 107; 142 R. R. 272.

(d) *The Adriatic*, [1931] P., at p. 215; 103 L. J. P. 188; *The Njegos*, [1936] P., at p. 101.

(e) *It. v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A. C., at p. 529; 106 L. J. K. B. 225.

(f) *Ibid.*, and see *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; 53 L. J. Q. B. 156.

contracts of affreightment, unless a different intention appears, the law which governs is the law of the country to which the carrying ship belongs (g). Conversely, where a contract made in one country has to be performed in another country, an inference arises, unless a contrary intention appears, that the law of the place of performance was intended to govern the obligations of the parties (h).

Other material matters to consider in ascertaining the intention of the parties are the nature of the transaction, the language and form of the documents and the general flavour of the contract (i). Thus the presence of an English arbitration clause has been held to be decisive evidence that the contract was to be governed by English law (k).

But where a contract governed by foreign law is sought to be enforced in this country, the *procedure* is regulated by English law. Thus, by section 4 of the Statute of Frauds, it is provided that "*No action shall be brought*" in respect of certain contracts, unless the agreement or some note or memorandum thereof is in writing. This statute simply regulates procedure by requiring a certain kind of evidence, and accordingly, though a verbal contract, made in and governed by the law of a foreign country, may be valid and enforceable in that country, it cannot be enforced in this country in default of the evidence required in English Courts (l). So also the English Statutes of Limitation regulate the time within which any action can be brought in English Courts (m).

8. It must be construed *according to the real intent of the parties*, to be collected from the language they have used, greater regard being paid to the clear intent of the parties than to any particular words which they may have used in the expression of their intent (n).

"In order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself

(g) *Ibid.*, and see *Lloyd v. Guibert*, L. R. 1 Q. B. 115; 35 L. J. Q. B. 74.

(h) *Ibid.*, and see cases cited in notes (d) (e) (f), *supra*.

(i) *The Adriatic*, [1931] P. 241; *R. v. International Trustees, etc.*, [1937] A. C. 501 (notes held to be governed by American law because (*inter alia*) they were issued in America, they were expressed in terms of American currency, they were secured by a pledge agreement made in America, performed in America by the deposit with an American company of securities on terms appearing to give rights governed by American law, and they contemplated a judicial sale which could only mean a sale by orders of an American Court).

(k) *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202.

(l) *Leirour v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 849.

(m) *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331.

(n) *Ford v. Beech*, 11 Q. B., at p. 866; 17 L. J. Q. B. 114; *Coddington v. Palacologo*, L. R. 2 Ex., at pp. 198, 200; 36 L. J. Ex. 73.



in thought in the same position as the parties to the contract were placed, in fact, when they made it—or, as it is sometimes phrased, to be informed as to the surrounding circumstances” (o), “in order to identify what the parties were contracting about, and to identify the subject matter of the contract” (p).

4. The construction must be *upon the document as a whole*, effect being given, as far as possible, to every word used (q). The document “must be read as a whole in order to ascertain the true meaning of its several clauses and . . . the words of each clause should be interpreted so as to bring them into harmony with the other provisions . . . if that interpretation does no violence to the meaning of which they are naturally susceptible” (r).

Thus, where an agreement is made for sharing the profits of a business, the agreement must be looked to as a whole in order to determine whether a partnership is created thereby (s).

In the case of *inconsistency* between different clauses of a document, the following are some of the principal rules which apply:—

- i. In a deed, if the recitals are clear and the operative part is ambiguous, the recitals control the operative part and govern the construction; if the recitals are ambiguous and the operative part is clear, the operative words must prevail; if the operative part and the recitals are both clear but are inconsistent with each other, the operative part must prevail (t).
- ii. In documents other than wills, if there are two inconsistent clauses the former usually prevails (u). General words are, however, usually controlled by subsequent special provisions (x). And where, as in policies of assurance,

(o) *Charrington & Co., Ltd. v. Wooder*, [1914] A. C., at p. 82; 83 L. J. K. B. 220.

(p) *Reardon Smith Line, Ltd. v. Black Sea, etc., Insurance Co.*, [1939] A. C., at p. 570; 108 L. J. K. B. 692.

(q) *Rose & Frank Co. v. Crompton & Brothers*, [1923] 2 K. B., at p. 287; 92 L. J. K. B. 959; 129 L. T. 610. See also *Coddington v. Palacolago*, L. R. 2 Ex., at p. 198; 36 L. J. Ex. 73; *Laird v. Briggs*, 19 Ch. D. 22; 60 L. J. Ch. 260.

(r) *North Eastern Ry. v. Hastings*, [1900] A. C., at p. 267; 69 L. J. Ch. 516.

(s) *Baddeley v. Consolidated Bank*, 38 Ch. D. 288; 57 L. J. Ch. 468.

(t) *Ex p. Davies, re Moon*, 17 Q. B. D., at pp. 286, 289.

(u) *Williams v. Hathaway*, 6 Ch. D. 544; *Forbes v. Gt.*, [1922] 1 A. C., at p. 269; 91 L. J. P. C. 97. *The contrary is the rule in the case of a will: Rose & Frank Co. v. Crompton & Brothers (ubi supra).*

(x) See *Edwards v. Rees*, 7 C. & P. 340.

the document is a printed form in which the special provisions of the particular contract have been filled up in writing, if there is any doubt as to the construction of the whole document, the words added in writing must have a greater effect attributed to them than to the printed words (y).

- iii. But *falsa demonstratio non nocet*. That is to say, if there is in a document an adequate and *complete* description or definition of the subject-matter to which it is intended to apply, that description will not be affected or vitiated by a subsequent reference to the subject-matter containing *additional* but *erroneous* words of description as distinct from words *limiting* the generality of the former description (z).
- iv. The *ejusdem generis* rule.—Where particular words of description are followed by a general term, the meaning of the latter will not be extended beyond objects of the same classes as those enumerated by the preceding particular words. Thus, where a lease contained a provision for abatement of the rent if the demised premises should be destroyed by “fire, flood, storm, tempest, or other inevitable accident”, it was held that these last words were limited to accidents similar to fire, flood, storm, or tempest (a). And the same principle may apply when general words follow a single particular term. Thus, where a ship had liberty to call at any ports “for bunkering or other purposes”, it was held that the words “other purposes” must be limited to purposes similar to bunkering, i.e., purposes in furtherance of the contract voyage (b).

But *initial* general words are not cut down by *subsequent* specific words (c).

5. The construction must be *reasonable*. Thus, where A covenanted to pay money “immediately upon demand”, it was

(y) *Robertson v. French*, 4 East. at p. 135; 7 R. R. 535. Cited and approved in *Glyn v. Margetson*, [1891] A. C., at p. 358; 62 L. J. Q. B. 466.

(z) For a full explanation of this maxim, see *Webber v. Stanley*, 16 C. B. (N.S.) 698; 33 L. J. C. P. 217; 139 R. R. 672; and *Smith v. Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11, 198; 143 R. R. 472, 789.

(a) *Saner v. Bilton*, 7 Ch. D. 815; 47 L. J. Ch. 267; 38 L. T. 821. See also the full explanation of the rule in *S.S. Magnhild v. McIntyre Brothers*, [1920] 3 K. B. 321; 89 L. J. K. B. 1110; 36 T. L. R. 744; affirmed [1921] 2 K. B. 97; 90 L. J. K. B. 527.

(b) *Foscolo Mango & Co. v. Stay Line, Ltd.*, [1932] A. C. 328; 101 L. J. K. B. 165.

(c) *Ambatielos v. Anton Jurgens Margarine Works*, [1923] A. C. 175; 92 L. J. K. B. 306.

held that the word "immediately" must receive a reasonable construction so as to allow A to have a reasonable time for procuring or fetching the money (d).

6. The construction must be *liberal*, i.e., the language must be given its most comprehensive meaning, unless there is something to show that it was used in a limited sense. Thus the word "men" in a contract may include both men and women (e).

7. The construction must be *favourable*, *ut res magis valeat quam pereat* (f). "An instrument ought not to be construed in such a way as to render it, to the knowledge of both parties, wholly inoperative" (g). And "where a clause is ambiguous, a construction which will make it valid is to be preferred to one which will make it void" (h).

8. The construction must be, so far as it properly may, *against a grantor or promisor* and in favour of a grantee or promisee (i). Thus, an agreement to guarantee the payment of goods up to £200 has been held to be a continuing guarantee and not a guarantee limited to one particular delivery of goods (k).

This rule of construction does not, however, apply to Crown grants, in the case of which the construction is against the grantee (l).

9. A document, if plain and unambiguous, must be construed according to the primary, natural, and grammatical meaning of the terms used, unless either (i) they have by any custom or usage acquired some particular meaning (m), or (ii) the context shows that they must be understood in some particular sense (n).

(d) *Toms v. Wilson*, 4 B. & S. 442; 32 L. J. Q. B. 38, 382; 129 R. R. 799, 806. See also *Brighty v. Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38; 129 R. R. 327; *Massey v. Sladen*, L. R. 1 Ex. 13; 38 L. J. Ex. 31; *Capper v. Wallace*, 5 Q. B. D. 163; 49 L. J. Q. B. 350.

(e) As to the liberal construction of certain words in statutes, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63). By s. 61 of the Law of Property Act, 1925, it is provided that in all deeds, contracts and other instruments executed, made or coming into operation after 1925, the term month means calendar month, the singular includes the plural and *vice versa*, and the masculine includes the feminine and *vice versa*.

(f) *Roe v. Trammarr*, Willes 632.

(g) *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. at p. 46; 78 L. J. Ch. 63.

(h) *North Eastern Ry. v. Hastings*, [1900] A. C., at p. 270; 69 L. J. Ch. 516.

(i) *Neill v. Devonshire (Duke of)*, 8 A. C., at p. 149; 31 W. R. 622.

(k) *Hargrave v. Smee*, 6 Bing. 244; 8 L. J. C. P. 46; 31 R. R. 407.

(l) *Eastern Archipelago Co. v. R.*, 2 H. & B. 856; 23 L. J. Q. B. 82; *Viscountess Rhonddu's Claim*, [1922] 2 A. C., at p. 353.

(m) *Anle*, p. 92.

(n) See *Mallan v. May*, 13 M. & W., at p. 517; 12 L. J. Ex. 376; 14 L. J. Ex. 48; 63 R. R. 708; 67 R. R. 707; *Coddington v. Palacologo*, L. R. 2 Ex. at p. 197; 36 L. J. Ex. 73; *McCowan v. Daine*, [1891] A. C., at p. 408; 65 L. T.

- (vii) in every Act passed after 1850, unless the contrary intention appears (z);
- (viii) by s. 61 of the *Law of Property Act, 1925*, in all deeds, contracts, and instruments executed, made or coming into operation after 1925, unless the context otherwise requires.

When a contract is made "from" a certain date "until" a certain date, "in general the day on which the engagement is entered into is excluded and the last day of the term is included" (a). But "it is impossible to lay down any fixed rule . . . each case must depend on its own circumstances and subject-matter" (b). So also, the word "on" or "upon" may mean either "before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter" (c).

When a contract is to be completed by a certain day, the Common Law rule was that time was of the essence of the contract; but, unless it was expressly so made, either at the time of the contract, or by notice given afterwards, or it appeared to be so intended from the nature of the property, or the surrounding circumstances, Equity would grant specific performance, notwithstanding failure to observe the time fixed by the contract for completion, and, as an incident of specific performance, would restrain an action at law based on such failure (d).

By s. 41 of the *Law of Property Act, 1925* (replacing a similar provision of the *Judicature Act, 1873* (e)), it is, however, provided that stipulations in a contract as to time, which according to the rules of Equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with the same rules.

Accordingly, even in granting Common Law remedies, the Court may give relief against the breach of a stipulation as to

(z) Interpretation Act, 1889, s. 3.

(a) *Young v. Higgon*, 6 M. & W. 49; 9 L. J. M. C. 29; *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex., at p. 300; 39 L. J. Ex. 189; cp. *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402; 60 L. J. Q. B. 47. In earlier cases, however, the contrary view seems to have been preferred.

(b) *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex., at p. 299.

(c) *R. v. Humphrey*, 10 Ad. & El., at p. 369; 50 R. R. 418; cited and followed in *Paynter v. James*, L. R. 2 C. P., at p. 354.

(d) *Stickney v. Keeble* [1915] A. C. 415, 417, 44 T. L. R. 520.

Accordingly words which have a *technical legal meaning* must be given that meaning (o) unless the context clearly shows that they were intended to have some other meaning (p). And "words denoting *weight, or measure, or number*, must . . . be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute, or given by custom" (q).

And although, as has been already pointed out, parties to commercial contracts may be deemed to have contracted with reference to known usages and customs, the evidence in respect of such usages or customs must not be of a particular meaning which is "repugnant to, or inconsistent with the written contract" (r). And—*expressum facit cessare tacitum*—that is to say, when a document contains express provisions upon a subject, no other terms upon the same subject can be implied (s).

10. With regard to time the following rules should be noted:—

The primary meaning of the word "month" is lunar month (t). There are, however, many cases in which the term "month" means a calendar month, *e.g.*:—

- (i) in ecclesiastical documents;
- (ii) in mortgages;
- (iii) in cases where the context or the nature of the circumstances require the meaning of calendar month;
- (iv) where by mercantile usage or by some custom (as in the case of notice to domestic servants) it has the meaning of calendar month (u);
- (v) (*prima facie*) in contracts for the sale of goods (w);
- (vi) in bills of exchange, promissory notes and cheques (y);

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(o) *Leach v. Jay*, 9 Ch. D. 42; 47 L. J. Ch. 876; 39 L. T. 242; *Re Gibbs*, [1907] 1 Ch. 465; 76 L. J. Ch. 288.

(p) *Smyth v. Smyth*, 8 Ch. D. 561; *Hale v. Hale*, [1892] 1 Ch. 361; 61 L. J. Ch. 289.

(q) *Smith v. Wilson*, 3 B. & Ad., at p. 784; 1 L. J. K. B. 194; 37 R. R. 536.

(r) *Brown v. Byrne*, 3 E. & B., at pp. 715, 716; 23 L. J. Q. B. 313; 97 R. R. 745; *Palgrave, Brown & Son, Ltd. v. Owners of S.S. Turid*, [1922] 1 A. C. 397; 91 L. J. P. 81.

(s) *Stephens v. Junmor Army and Navy Stores, Ltd.*, [1914] 2 Ch., at p. 526; 84 L. J. Ch. 56. See also *Aspden v. Austin*, 5 Q. B., at p. 684; 18 L. J. Q. B. 155.

(t) *Phipps & Co. v. Rogers*, [1925] 2 K. B. 14; 93 L. J. K. B. 1009.

(u) As to (i), (ii), (iii), (iv) see *Phipps & Co. v. Rogers* (*ubi supra*). There is no general exception making it mean calendar month in all mercantile or commercial documents, and "if any such exception be set up it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place": *Brunner v. Moore*, [1901] 1 Ch., at p. 311; 73 L. J. Ch. 877. The custom by which in all mercantile transactions in the City of London a month means calendar month has been judicially recognised: *id.*

(w) Sale of Goods Act, 1893, s. 10 (2), *post*, Part III, Chapter V.

(y) Bills of Exchange Act, 1882, s. 14 (4), *post*, Part III, Chapter VI.

time, provided that the case is one in which, before the Judicature Act, 1873, Equity would, for the purpose of decreeing its own remedies, have disregarded the stipulation (f). In mercantile transactions, however, stipulations as to time are of the essence of the contract (g), except in contracts for the sale of goods which are governed by special statutory rules (h).

### SECTION 7.—*The Operation and Effect of Contracts*

A contract, as a general rule, merely creates a right *in personam*, vested only in the promisee and enforceable only against the promisor. "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue upon it" (i).

Thus, in the case of *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (k), X contracted with the plaintiffs to purchase a certain quantity of the plaintiffs' goods and agreed not to sell them at less than the plaintiffs' list prices, and on any re-sale to obtain from the purchaser a similar undertaking. X sold to the defendants and obtained from them an undertaking by which they agreed not to sell below the plaintiffs' list prices and to pay a penalty to the plaintiffs for any breach of the agreement. In breach of this undertaking the defendants sold below the list prices. Held, that the plaintiffs could not maintain an action against the defendants for breach of the undertaking.

Again, in *Fley v. Positive Assurance Co.* (l), the articles of association of a limited company provided that the plaintiff should be employed as the solicitor to the company. Held, that, as the articles of association merely constituted a contract between the shareholders, this provision gave no right to the plaintiff, who was not a shareholder.

It was at one time thought that, where a parent contracted for the benefit of his child, the nearness of the relationship would give the child the benefit of a consideration performed by the parent and would enable the child to maintain an action upon the contract. But it was settled by the case of *Tweddle v. Atkinson* (m) that "no stranger to the consideration can take advantage of a contract though made for his benefit".

(f) *Stickney v. Keeble* (*ubi supra*); *Lock v. Bell*, [1831] 1 Ch. 35; 100 L. J. Ch. 22.

(g) *Reuter v. Sala*, 1 C. P. D. 249; 48 L. J. Q. B. 492; *Hartley v. Hymans*, [1920] 3 K. B., at pp. 463, 484; 90 L. J. K. B. 11.

(h) Sale of Goods Act, 1893, s. 10 (1); see *post*, Part III, Chapter IV.

(i) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C., at p. 853.

(k) [1915] A. C. 847; 84 L. J. K. B. 1680.

Conversely, only a person who is a party to a contract can as a rule be sued upon it.

Thus, in *Schmaling v. Tomlinson* (n), A employed B as his agent to transact certain business for him. B without A's knowledge employed C to transact the business. Held, that as there was no privity of contract between C and A, C could not recover his charges from A.

To this general rule there are, however, the following exceptions:—

(i) A provision in a statute may enable a stranger to a contract to sue upon it. In such cases there is a statutory obligation for which the remedy was formerly an action of debt (o).

In *Tattersall v. Drysdale* (p), a motor insurance policy contained a clause indemnifying any person driving the insured car with the permission of the assured. By section 36 (4) of the Road Traffic Act, 1930 (which deals with third-party risks), it is provided that a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in their case. Held, that by virtue of this section the insurers were under a statutory liability to indemnify a person driving with the consent of the assured.

(ii) A principal, whether disclosed or undisclosed, can sue or be sued upon a simple contract made by his agent, and a person can ratify and sue or be sued upon a simple contract made by someone else upon his behalf. Here the general rule does not apply because the contracts of an agent, otherwise than under seal, whether he is so constituted antecedently to the transaction or by ratification, are the contracts of his principal (q).

Thus, if A deposits money in a bank in the names of A and B and payable to A or B, an action for the money can be brought by B if the bank refuses to pay, provided that A had authority to make the deposit in that form or his act was ratified by B (r).

(iii) Where a party to a contract is, at the date when he enters into it, or thereafter constitutes himself, a trustee for a third party, that party has a right conferred upon him by way of property to sue on the contract and, if the trustee

(n) 6 Taunt. 117.

(o) *Ante*, p. 8; and see *Re Rotherham Alum, etc., Co.*, 25 Ch. D., at p. 111; 53 L. J. (Ch. 280).

(p) [1935] 2 K. B. 174; 104 L. J. K. B. 511.

refuses to sue, he can himself sue, joining the trustee as defendant (s).

(iv) The benefit or burden of a covenant may in certain cases be annexed to land so that it can be enforced by or against the assignees of the land (t).

(v) The benefit of a contract may be assigned to a third party or may pass by operation of law to a third party so as to enable him to sue (u).

(vi) A contract for the sale of goods may pass the property in the goods and so create a right *in rem* (x).

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(s) *Vandrupitte v. Preferred, etc., Insurance Corporation of New York*, [1933] A. C. 70; 102 L. J. P. C. 21; *Harmer v. Armstrong*, [1934] 1 Ch., at pp. 87, 88; 103 L. J. Ch. 1. See also *Re Empress Engineering Co.*, 16 Ch. D., at p. 129; *Royal Exchange Assurance v. Hope*, [1928] Ch., at p. 185; 97 L. J. Ch. 158.

(t) See *post*, Part I, Chapter V.

(u) *Ibid.*

(x) Sale of Goods Act, 1893, s. 1. See further, *post*, Part III, Chapter V.



## CHAPTER II

MISREPRESENTATION AND FRAUD—EQUITABLE FRAUD—  
DURESS—MISTAKESECTION 1.—*Misrepresentation and Fraud*

A CONTRACT which in all other respects is valid may be induced by a misrepresentation made by one party to the other. In such a case the contract is *voidable* at the instance of the party who was deceived. That is to say, it remains valid unless and until it is rescinded but, subject to conditions which will be explained, the party who was deceived may, if he wishes, rescind it.

A misrepresentation must be distinguished from the breach of a condition or warranty. Conditions and warranties are terms of a contract, so that their non-performance is a breach of the contract (*a*). A representation, on the other hand, is a statement which induces, but does not form part of, the contract. Thus, if A contracts to sell goods of a particular make or quality, his stipulations as to their make or quality are conditions or warranties; that is to say, the contract must be performed by the supply of goods of the make or quality promised. But if A induces the purchaser to contract by making a false statement as to his reasons for selling, that statement is not a promise which has to be fulfilled in the performance of the contract, but is a misrepresentation which may induce the contract and may render it voidable (*b*).

Whether or not a statement is a representation or a warranty depends in each case upon the circumstances of the transaction and the construction of the relevant documents (*b*). But where a representation is subsequently embodied in the contract it is merged in the contract and can be treated only as a condition or warranty (*c*).

(*a*) *Bahn v. Burness*, 3 B. & S., at p. 753; 32 L. J. Q. B. 204; 124 R. R. 794. The difference between a condition and a warranty will be explained later.

(*b*) *Bahn v. Burness* (*ubi supra*). It may therefore be possible to plead that a statement was (*a*) a representation and (*b*), alternatively, a condition or warranty.

(*c*) *Fennslandra Shipping Co. v. Compagnie Nationale de Navigation*, [1936] W. N. 254.

SUB-SECTION 1.—*What amounts to a Misrepresentation*

To constitute a misrepresentation rendering a contract voidable :—

1. *There must be a positive misstatement or a statement so partial and fragmentary that the omissions make what is stated absolutely false (d).*

The misstatement may be either by words or by conduct, as, for example, by some contrivance to hide defects in a thing sold (e). It may be by a statement which is wholly false or by an omission to tell the whole truth; for if a matter is stated partially there may be as false a statement as if it were misstated altogether. "Every word may be true, but if you leave out something which qualifies it you may make a false statement. For instance, if, pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement" (f).

And, if a statement has been made which is true at the time but in the course of the negotiations between the parties becomes untrue, then there is an obligation to correct such erroneous statement (g).

But mere silence, or non-disclosure, as distinct from telling half the truth or failure to correct a statement which has become untrue, is not misrepresentation unless it relates to some material fact which there is a duty to disclose (h).

A duty to disclose all material facts exists in all contracts *uberrimæ fidei*, i.e. :—

- i. Family arrangements (i) and compromises (k).
- ii. Transactions between persons in a fiduciary relationship to each other, e.g., between companies and their directors or promoters (l), solicitors and their clients (m), or partners (n).

(d) *Peek v. Gurney*, L. R. 6 H. L., at p. 403; 43 L. J. Ch. 19.

(e) *Schneider v. Heath*, 3 Camp. 506; 14 R. R. 825; *Horsfall v. Thomas*, 1 H. & C., at p. 99; 31 L. J. Ex. 322; 130 R. R. 391.

(f) *Arkwright v. Newbold*, 17 Ch. D., at p. 318; 50 L. J. Ch. 372.

(g) *Davies v. London, etc., Insurance Co.*, 8 Ch. D., at p. 475; 47 L. J. Ch. 511; 38 L. T. 478; *Brownlie v. Campbell*, 5 A. C., at p. 950. This rule does not apply merely to contracts *uberrimæ fidei*: *With v. O'Flanagan*, [1936] 1 Ch. 575.

(h) *Peek v. Gurney*, L. R. 6 H. L., at p. 390; 43 L. J. Ch. 19; *Ward v. Hobbs*, 4 A. C., at p. 26; 48 L. J. Q. B. 281; 40 L. T. 73; *Turner v. Green*, [1895] 2 Ch., at p. 208; 64 L. J. Ch. 539.

(i) *Gordon v. Gordon*, 3 Swanst. 163; 19 R. R. 230.

(k) *Maynard v. Eaton*, L. R. 9 Ch., at p. 422; 13 L. J. Ch. 641.

(l) *Erlanger v. New Sombrero, etc., Co.*, 3 A. C., at p. 1244; 48 L. J. Ch. 73.

(m) *Maopherson v. Watt*, 3 A. C., at p. 266.

(n) 3 A. C., at p. 1211. As to all these cases and other illustrations of this principle, see also *Davies v. London, etc., Insurance Co.* 8 Ch. D. at p. 475.

- iii. All contracts of insurance (o), in which everything must be disclosed which would affect the judgment of the insurers in deciding whether to accept the risk (p).
- iv. (To some extent) contracts for the sale of land. A *vendor* of real estate is presumed to be selling the property free from incumbrances or restrictions, except so far as he has given notice to the contrary (q), and therefore the non-disclosure of any material defect in his title amounts to a misrepresentation (r). But the non-disclosure of a defect in the *quality* of the property sold does not amount to a misrepresentation, though if the vendor fails to disclose a latent defect so great as to make the property substantially different from that which he contracted to sell, the purchaser may, at Common Law, treat the contract as discharged by *non-performance* (s). No duty of disclosure rests, however, upon a *purchaser* unless he is in a fiduciary relationship to the vendor (t), or has, unknown to the vendor, done acts which have altered their position with regard to the property, *e.g.*, has trespassed upon a mine and raised coal (u).

(o) *London Assurance v. Mansel*, 11 Ch. D. 363; 48 L. J. Ch. 381; *Seaton v. Heath*, [1899] 1 Q. B., at p. 752; 68 L. J. Q. B. 681; Marine Insurance Act, 1906, s. 18.

(p) *Locker & Woolf, Ltd. v. Western Australia Insurance Co.*, [1936] 1 K. B. 408. (Proposal for fire insurance. Failure by the intending assured to disclose that a previous application for a policy on motor cars had been declined on the ground of misrepresentation. Held, that this non-disclosure was material as affecting the moral integrity of the proposer.)

(q) *Re Cox and Neve*, [1891] 2 Ch., at pp. 116, 117; *Re Ebsworth and Tidy*, 42 Ch. D., at p. 47; 58 L. J. Ch. 665.

(r) *Carlisle v. Salt*, [1906] 1 Ch., at pp. 340, 341; 75 L. J. Ch. 175. See also *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; 72 L. J. K. B. 873; 89 L. T. 850.

(s) *Flight v. Booth*, 1 Bing. N. C. 370; 4 L. J. C. P. 66. As to discharge of a contract by non-performance, see also *post*, Chapter V, Section 1, Sub-section 5. It has also been held that non-disclosure of a latent defect in the quality of the property, though not sufficiently material to enable the purchaser to rescind, may nevertheless prevent the vendor from obtaining the equitable remedy of specific performance: *Bygones v. Lodge*, [1925] Ch. 350; 95 L. J. Ch. 27. Compare, however, *Shepherd v. Croft*, [1911] 1 Ch. 521; 80 L. J. Ch. 170; 103 L. T. 874; *Re Belcham and Garley's Contract*, [1930] 1 Ch. 56; 99 L. J. Ch. 37.

(t) *Coaks v. Borewell*, 11 A. C., at p. 235; 55 L. J. Ch. 761; *Haygarth v. Wearing*, 1 L. R. 12 Eq. 320; 40 L. J. Ch. 577.

(u) *Phillips v. Homfray*, [1892] 1 Ch. 465; 61 L. J. Ch. 210. To the above are sometimes added contracts for the sale of shares in companies, and contracts of guarantee and suretyship. In the first case there is, under s. 38 of the Companies Act, 1948, a statutory obligation to disclose certain facts, but, apart from this, the contract does not appear to be *uberrima fidei* (*Aaron's Reefs v. Tass*, [1896] A. C., at p. 287; 65 L. J. P. C. 51; *McKeown v. Boudard & Co.*, 65 L. J. Ch. 735 decided on the corresponding section of the Companies Act, 1929). There are, however, earlier *dicta* to the contrary. As to contracts of guarantee and suretyship, see *post*, Part III, Chapter III, Section 1.

2. *It must be a misstatement of fact, i.e.:*—

i. *Not of law*—that is to say, not of a general rule of law (x); but a misstatement of fact which involves a misstatement of law may be a misrepresentation. Thus, to state that a man is married or entitled to property is a statement of fact although it involves a statement of law (y). So also a misrepresentation may be made by a misstatement as to the effect of a deed (z), or as to the meaning of a written agreement (a), or of a private Act of Parliament (b), or as to any private rights (c).

ii. *Nor of mere opinion, intention, or expectation.*—A mere exaggeration upon what is entirely a matter of opinion is not a misrepresentation (d). Thus, mere “puffing”, i.e., exaggerated praise by a vendor, as, e.g., that land is “fertile and improvable”, or that an article made by A is “equal” to an article of the same kind made by B, does not, except in extreme cases, amount to misrepresentation (e). But it is otherwise if there is a misstatement as to a “definite triable fact”, e.g., where an article is represented to be made of 15-carat gold, whereas in fact it is of 6-carat gold (f).

And a statement relating solely to the *future conduct* of the person making the statement can take effect only as a promise forming one of the *terms* of a contract. But a statement of opinion, intention, or expectation, *may* necessarily involve a representation of fact (g). Thus, a statement that an hotel is let to a “most desirable tenant” involves a misrepresentation of fact if the tenant is insolvent and only pays rent by dribblets and under pressure (h). So also a statement by A that he expects to have his house completed next week involves a representation that he has a house which is near completion (i). And, “at any

(x) *Rashdall v. Ford*, L. R. 2 Eq. 750; 35 L. J. Ch. 769.

(y) See the judgment of Jessel, M.R., in *Eaglesfield v. Londonderry*, 4 Ch. D., at p. 702.

(z) *Hirachfield v. L. B. & S. C. Ry.*, 2 Q. B. D. 1; 46 L. J. Q. B. 94.

(a) *Wilding v. Sanderson*, [1897] 2 Ch. 534; 66 L. J. Ch. 684.

(b) *West London, etc., Bank v. Kitson*, 13 Q. B. D. 980; 58 L. J. Q. B. 345.

(c) *Cooper v. Phibbs*, L. R. 2 H. L., at p. 170.

(d) *Anderson v. Pacific Insurance Co.*, L. R. 7 C. P. 65.

(e) *Dimmock v. Hallett*, L. R. 2 Ch., at p. 27; 36 L. J. Ch. 146; 15 L. T. 371; *R. v. Bryan*, D. & B. 265; 26 L. J. M. C. 84.

(f) *R. v. Ardley*, L. R. 1 C. C. R. 301; 40 L. J. M. C. 85.

(g) *Bisnet v. Wilkinson*, [1927] A. C. 177; 96 L. J. P. C. 12.

(h) *Smith v. Land, etc., Corporation*, 28 Ch. D. 7.

(i) *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. at p. 288; 64 L. J. P. C. 54. The dictum in *Edgington v. Fitzmaurice*, 29 Ch. D. 459; 55 L. J. Ch. 650, that “A state of a man's mind is as much a fact as the state of his digestion”, must be read subject to the qualification stated in the text:

rate the existence of the opinion in the person stating it is a question of fact", so that a man may be guilty of a misrepresentation if he did not "honestly and in fact" hold the opinion which he expressed (k).

3. It must be *made to induce the plaintiff to act*. Thus, as a general rule, when a prospectus has been issued by a company for the purpose of inducing persons to subscribe for shares, a person who does not apply to the company for shares but subsequently purchases shares in the open market from an original applicant, cannot complain that he relied on misstatements in the prospectus of the company, because the purpose of a prospectus is to invite persons to become original allottees, and having done this its effect is exhausted (l).

But this rule does not apply if a prospectus has been used as part of a system of misrepresentations in order to induce a person to buy in the open market.

Thus, in *Andrew v. Mockford* (m), the defendant formed a mining company and sent a prospectus to the plaintiff, who did not apply to have any shares allotted to him. Some months afterwards the defendant caused to be published in a financial newspaper a false and concocted telegram as to the value of the company's mine. The plaintiff, having seen this, bought some shares from the defendant in the open market. *Held*, that as the prospectus and the publication of the telegram formed one continuous fraud, the function of the prospectus was not exhausted and the plaintiff was entitled to rely on misrepresentations which it contained.

4. It must have induced the plaintiff to act.—The plaintiff must prove that he was deceived by the representation (n), and that it actually induced him to act (o), though it need not have been the sole inducement (p). It is, therefore, a good defence that the plaintiff did not rely at all upon the representations, but acted solely on his own inquiries (q); but, if the plaintiff did in

see *Yorkshire Insurance Co. v. Nunn*, [1922] 2 A. C., at p. 353; 91 L. J. P. C. 226.

(k) *Bisset v. Wilkinson*, [1927] A. C., at p. 182; 96 L. J. P. C. 12.

(l) *Peck v. Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19.

(m) [1896] 1 Q. B. 372; 65 L. J. Q. B. 302.

(n) *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J. Ex. 322; 130 R. R. 394; the defendant actively concealed a defect in a gun sold to the plaintiff, who did not examine it, and therefore was not in fact deceived. See also *Macleay v. Tait*, [1906] A. C., at p. 31; 75 L. J. Ch. 90.

(o) *Nash v. Athorpe*, [1905] 2 Ch. 237; 74 L. J. Ch. 493; *Smith v. Chadwick*, 9 A. C. 187; 52 L. J. Ch. 873; 50 L. T. 697.

(p) *Edgington v. Frawley*, 20 Ch. D., at 466; 55 L. J. Ch. 650; 53 L. T. 369.

(q) *Rodgers v. Hurst*, 20 Ch. D., at pp. 43, 21; 51 L. J. Ch. 118.

fact rely upon the representations, it is no defence to prove merely that he had the means of discovering the truth (r).

5. *It must be made by the other party to the contract or by his agent (s).*

**Fraud.**—To constitute fraud there must be an *active misrepresentation* (t) (as distinct from non-disclosure) made “(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false”. It is not fraud to make a false statement merely through want of care, nor to make a false representation which is honestly believed in, though upon insufficient grounds (u).

Thus, in *Derry v. Peek* (x), the plaintiff was induced to subscribe for shares in a company by a statement in the prospectus that, under its special Act, the company had the right to use steam power. In fact the Act, in giving this right, provided that it was to be exercised only with the consent of the Board of Trade. But, before the Act was obtained, the plans of the company had been approved by the Board of Trade, and the directors therefore took it for granted that consent had substantially been obtained. The Board of Trade, however, ultimately refused to consent to the use of steam power, and the plaintiff in consequence brought an action of deceit against the directors of the company. *Held*, that they were not liable, since they had made the statement as to the use of steam power in the honest belief that it was true. As to the present law with regard to the prospectus of a company, see, however, sections 38 and 43 of the Companies Act, 1948. *post*, p. 109.

“But if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made” (y).

It has been said that the mere failure to correct a statement which has become untrue is fraud (z). But in a later case it has been pointed out that nowadays the Court is more reluctant to use the word “fraud”, and would not generally use the word “fraud” in that connection because the failure to disclose,

(r) *Dobell v. Stevens*, 3 P. & C. 263; 3 L. J. K. B. 89; 27 R. R. 111; *Central Railway of Venezuela v. Kisch*, L. R. 2 H. L., at pp. 120, 121; 36 L. J. Ch. 819; *Nocton v. Ashburton*, [1914] A. C., at p. 962; 83 L. J. Ch. 784.

(s) *Wheellon v. Hardisty*, 8 E. & B. 232; 26 L. J. Q. B. 265; *Re Metal Constituents, Ltd.*, [1902] 1 Ch. 707; 71 L. J. Ch. 323.

(t) *Peek v. Gurney*, L. R. 6 H. L., at p. 603; 43 L. J. Ch. 19.

(u) *Derry v. Peek*, 14 A. C., at pp. 374, 375.

(x) 14 A. C. 337; 58 L. J. Ch. 864.

(y) 14 A. C., at p. 311; *Smith v. Chadwick*, 9 A. C., at p. 201; 52 L. J. Ch. 873. See also *Polhill v. Walter*, 3 B. & Ad. 111; 1 L. J. K. B. 92; 37 R. R. 344.

(z) *Brownlie v. Campbell*, 5 A. C., at p. 950.

though wrong and a breach of duty, may be due to inadvertence or a failure to realise the duty of correcting the statement (a).

### SUB-SECTION 2.—*Remedies for Misrepresentation and Fraud*

For fraud, whether or not connected with a contract, the Common Law gave the action of deceit, which was an action of tort for damages. For an innocent misstatement the Common Law could give no remedy unless it had been embodied in a contract as one of its terms, so that an action for breach of contract would lie (b).

Equity would refuse specific performance of a contract induced by misrepresentation, and, if the misrepresentation was fraudulent or material, would rescind the contract. Also, though it could not give damages, it would compel the defendant to indemnify the plaintiff against any obligations or liabilities arising out of the transaction set aside, e.g., against the debts and liabilities of a partnership which was dissolved (c).

Since the Judicature Act, 1873, the rules of Equity have prevailed and misrepresentation, if fraudulent or material, is a ground for rescission in all Courts (d). And, following the Equity rules, the defendant, though his misrepresentation was innocent, may be compelled to indemnify the plaintiff (e).

Accordingly, if a contract is induced by misrepresentation—

1. When the misrepresentation is innocent and material the party deceived may obtain its rescission and an indemnity against any obligations which he has incurred under it.

2. When the misrepresentation is fraudulent he may either—

(a) Without asking for rescission, obtain damages for deceit; or

(b) Claim rescission and damages for any loss suffered through the deceit (f), though not for any loss suffered through the contract. Thus, he can recover damages for the loss of a situation which he has given up in consequence of the fraud (g), but if he rescinds a lease

(a) *With v. O'Flanagan*, [1936] 1 Ch., at p. 584.

(b) See *Behn v. Burner*, 3 B. & S. 751; 32 L. J. Q. B. 204; 121 R. R. 794. See also *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.

(c) *Newbigging v. Adam*, 31 Ch. D., at pp. 589, 592-3; 56 L. J. Ch. 275.

(d) *Lester Bros., Ltd. v. Ball*, [1931] 1 K. B. 557; 100 L. J. K. B. 78; 47 T. L. R. 17, explaining and qualifying *Kennedy v. Panama Canal Co.*, L. R. 2 Q. B. 580.

(e) See *Norton v. Ashburton*, [1911] A. C. 932; 83 L. J. Ch. 784.

(f) *Newbigging v. Adam*, 31 Ch. D., at p. 592; 57 L. J. Ch. 1066.

(g) See *Redgrave v. Hurd*, 20 Ch. D. 1; 51 L. J. Ch. 113, where a counter-claim for damages in addition to rescission failed only because *fraud* had not been alleged.

which the lessee has obtained by fraud he cannot make the defendant liable for the use and occupation of the premises (h).

But, following the Common Law rules, damages cannot be given unless the misrepresentation was fraudulent, except:

1. On a warranty of authority, *i.e.*, where an agent, however innocently, misrepresents the nature or extent of his authority (i).

2. Under s. 88 of the *Companies Act*, 1948 (replacing s. 35 of the *Companies Act*, 1929).

This section requires certain matters therein specified to be set out in any prospectus (k) issued by or on behalf of a company or any person engaged or interested in the formation of a company. Non-compliance with this section will give to any person who has thereby suffered damage the right to recover damages from the person responsible (l) unless he proves that he was not cognisant of the matter not disclosed or that the non-compliance arose from an honest mistake of fact on his part, or the non-compliance was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or was otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused.

8. Under s. 48 of the *Companies Act*, 1948 (replacing s. 37 of the *Companies Act*, 1929).

By this section it is provided that, when a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director or promoter of the company, or who has authorised himself to be named and is named in the prospectus as a director or as having agreed to become a director, or who has authorised the issue of the prospectus, is liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, unless it is proved—

- i. That before the issue of the prospectus he withdrew his consent to become a director and that it was issued without his authority or consent; or

(h) *Lempriere v. Lange*, 12 Ch. D. 675.

(i) See *post*, Part III, Chapter I.

(k) By s. 45 it is provided that, where a company allots or agrees to allot any shares or debentures with a view to their being offered for sale to the public, any document by which the offer for sale to the public is made shall be deemed to be a prospectus issued by the company.

(l) See *Re South of England Natural Gas, etc., Co.*, [1911] 1 Ch. 378; 80 L. J. Ch. 358 (decided upon the corresponding section of the Act of 1908). But he is not thereby entitled to rescind a contract to take shares: *id.*



- ii. That the prospectus was issued without his knowledge and consent and that on becoming aware of its issue he gave reasonable public notice that it was so issued; or
- iii. That, before any allotment under the prospectus, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal and of the reason therefor; or
- iv. That

(a) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures believe, that the statement was true; and

(b) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement or was a correct and fair copy or extract, *unless* it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and

(c) as regards every untrue statement purporting to be a statement by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document.

*Conditions under which rescission cannot be obtained.*—Where a contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel or chose in action, rescission cannot be obtained unless the misrepresentation was fraudulent or a fiduciary relationship existed between the parties (*m*).

No contract can be rescinded—

1. Where *restitutio in integrum* is impossible. Thus a person who has been induced to buy shares in a company cannot repudiate them after the nature and constitution of the company

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(m) *Seddon v. N. E. Salt Co.*, [1905] 1 Ch. 326; 71 L. J. Ch. 199; *Angel v. Jay*, [1911] 1 K. B. 606; 80 L. J. K. B. 158; *Armstrong v. Jackson*, [1917] 2 K. B. 522; 86 L. J. K. B. 1375. This rule does not, however, apply to contracts to take shares from a company: see *First National Re-insurance Co. v. Greenfield*, [1921] 2 K. B., at p. 272; 90 L. J. K. B. 617. It has, moreover, been questioned by Scrutton, L.J.: see *Lever Brothers, Ltd. v. Bell*, [1931] 1 K. B., at p. 588; 100 L. J. K. B. 78.

have been altered (n) or after the commencement of the winding-up of the company (o). But the mere fact that the subject-matter of the contract has depreciated in value does not destroy the right to rescind (p).

2. Where third persons have in consequence of the contract acquired rights which they can enforce against the person who has been induced to enter into it (q). Thus, as has been pointed out, if A is induced by misrepresentation to sell goods to B, he cannot avoid the contract after B has sold the goods to an innocent sub-purchaser (r).

3. Where the plaintiff, with knowledge of his rights, has affirmed the contract either by express words or by unequivocal acts (s), as, e.g., by taking steps to sell property which he has bought on the faith of a misrepresentation (t), or exercising any other acts of ownership over it (u).

4. Where the plaintiff has been guilty of laches, i.e., of such delay that it would be inequitable to grant him the remedy of rescission. Laches is not, however, constituted by mere delay, but only by delay of such a length or in such circumstances or accompanied by such conduct as either to raise the inference that the plaintiff has waived his right or to affect the position of the defendant and to put him in a situation in which it would not be reasonable to put him if the remedy were afterwards to be asserted (x).

### SUB-SECTION 3.—*Equitable Fraud*

In Equity the term "fraud" was applied generally to unfair dealings and to breach of duty by persons in fiduciary positions, particularly where property or any benefit had been obtained by any unconscientious exercise of power or influence. In such cases Equity would grant the same remedies as if there had been actual misrepresentation (y).

(n) *Clarke v. Dickson*, F. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583.

(o) *Oakes v. Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949.

(p) *Armstrong v. Jackson* (*ubi supra*).

(q) *Oakes v. Turquand* (*ubi supra*).

(r) *Phillips v. Brooks*, [1919] 2 K. B. 243. See *post*, p. 121.

(s) *Abram Steamship Co. v. Westrille Shipping Co.*, [1923] A. C. 773; 93 L. J. P. C. 38.

(t) *Re Hop and Malt, etc., Co.*, L. R. 1 Eq. 483; 35 L. J. Ch. 320.

(u) *Scholey v. Central, etc., Ry.*, L. R. 9 Eq., at p. 266, n. 3.

(x) *Erlanger v. New Sombrero, etc., Co.*, 3 A. C., at p. 1279; 39 L. T. 269; 48 L. J. Ch. 73; *Blake v. Gale*, 32 Ch. D., at p. 581; 55 L. J. Ch. 559; 55 T. L. R. 234; *Re Eastace*, [1912] 1 Ch. 361; 81 L. J. Ch. 520; 106 L. T. 789; *Armstrong v. Jackson* (*ubi supra*).

(y) *Nocton v. Ashburton*, [1914] A. C., at p. 952; 83 L. J. Ch. 748; 111 L. T. 641; 30 T. L. R. 602.

The chief illustrations of equitable fraud are (1) unconscionable bargains and loans; (2) transactions in which benefit has been obtained by undue influence.

1. *Unconscionable bargains*.—The Court may set aside transactions in which advantage has been taken of the weakness or necessity of persons who have acted without adequate protection (a), as, for instance, dealings with expectant heirs on the security of their interests or on the credit of their expectations (b). A sale of a *remainder or reversion* at an undervalue could formerly be set aside on that ground alone. But by s. 174 of the *Law of Property Act, 1925* (re-enacting in substance the *Sales of Reversions Act, 1867*), it is provided that no purchase, made *bona fide* and without fraud, of any reversionary interest shall be set aside *merely* on the ground of undervalue. But undervalue may still be so great as to be *evidence* of fraud (c).

The grant of equitable relief against unconscionable bargains is not, however, limited to transactions with expectant heirs, and any dealings with ignorant or illiterate persons may be set aside if they did not understand the nature of the transaction, as, for instance, an improvident sale of property by a vendor who, through ignorance or inexperience, was not on equal terms with the purchaser (d).

*Unconscionable loans*.—In the case of unconscionable loans Equity would so far avoid the transaction as to compel the lender to be satisfied with the sum advanced and fair interest. Excessive interest alone was not formerly an equitable ground for setting aside a bargain, though it might be *void* under the usury laws until their repeal in 1854 (e). But now, by s. 1 of the *Money-lenders Act, 1900*, any Court in which proceedings are or might be taken by a *moneylender* (f) for the recovery of money lent

(a) See *O'Rorke v. Bolingbroke*, 2 A. C., at p. 823; *Fry v. Lane*, 40 Ch. D. 312; 58 L. J. Ch. 113; 60 L. T. 12.

(b) See *Aylesford v. Morris*, L. R. 8 Ch. 484; 42 L. J. Ch. 546; 28 L. T. 541.

(c) *Fry v. Lane* (*ubi supra*).

(d) See summary of cases in *Fry v. Lane* (*ubi supra*).

(e) See *Nerille v. Snelling*, 15 Ch. D., at pp. 702, 703; 49 L. J. Ch. 777; *Re a Debtor*, [1903] 1 K. B., at p. 709; 72 L. J. K. B. 382; 88 L. T. 401.

(f) *I.e.*, a person whose business is that of money-lending, or who advertises or holds himself out as carrying on that business: section 6. The expression "moneylender" does not, however, include (i) a pawnbroker, in respect of business carried on by him in accordance with the Pawnbrokers Acts, other than transactions effected under a special contract made in accordance with s. 24 of the Pawnbrokers Act, 1872 (*Moneylenders Act, 1927*, s. 10 (3)); see *post*, Part III, Chapter V, Section 2, sub-section 2); (ii) certain specified registered societies; (iii) any body corporate, incorporated or empowered by a special Act to lend money; (iv) any person *bona fide* carrying on the business of banking or insurance or any business not having for its primary object the lending of

or the enforcement of any agreement or security in respect of money lent may reopen the transaction and any account already taken between the moneylender and the person sued, and may set aside or vary any security or agreement, and may relieve the person sued from payment of any sum in excess of what is fairly due in respect of principal, interest, and charges, having regard to the risk and all the circumstances, *provided that the interest or the amount of any charges is excessive and the transaction is harsh and unconscionable* or is otherwise such that a Court of Equity would give relief.

The same section also provides that the like powers may, at the instance of the borrower or surety, or other person liable, be exercised by any Court in which such proceedings might be taken, although the time for repayment of the loan, or any instalment thereof, may not have arrived, and although the moneylender's right of action for the recovery of the money lent is barred (g).

By s. 10 of the *Moneylenders Act, 1927*, it is further provided that where, in any proceedings in respect of any money lent by a moneylender after the commencement of the Act (January 1, 1928), or in respect of any agreement or security made after that date in respect of money lent either before or after that date, it is found that the interest charged exceeds 48 per cent. per annum, the Court shall, *unless the contrary is proved*, presume that the interest charged is excessive and that the transaction is harsh and unconscionable (h). But this provision is without prejudice to the powers of the Court under s. 1 of the Act of 1900 where the Court is satisfied that interest at a rate not exceeding 48 per cent. per annum is excessive. Thus, where a borrower gave ample security for the sum advanced, it was held that 48 per cent. was so excessive a rate of interest as to make the contract harsh and unconscionable (i).

money; (v) any body corporate exempted from the Act by order of the Board of Trade. (See the *Moneylenders Act, 1927*, Schedule II.)

(g) S. 1 (1) of the *Moneylenders Act, 1900*, as amended by s. 10 (5) of the *Moneylenders Act, 1927*.

(h) Where the interest exceeds 48 per cent. per annum the borrower's consent to judgment does not relieve the Court of its duty to presume that the interest is excessive and the transaction harsh and unconscionable unless the contrary is proved. *Mills Conduit Investments, Ltd. v. Leslie and Denholm*, [1932] 1 K. B. 289; 100 L. J. K. B. 685. And although the Court may take into consideration the fact that the borrower does not appear to the writ or does not further defend the action, the onus is still on the moneylender to satisfy the Court that the interest is not excessive and that the transaction is not harsh and unconscionable: *Parkfield Trusts, Ltd. v. Dent*, [1931] 2 K. B. 579; 101 L. J. K. B. 8.

(i) *Verner-Jeffreys v. Pinto*, [1929] 1 Ch. 401; 98 L. J. Ch. 387.

Under these Acts the Court may give relief to a borrower if the transaction is harsh and unconscionable, although it is not a case in which Equity would have given relief. And an excess of interest, unless the lender can show that the contract is not in fact "harsh and unconscionable", may of itself be sufficient to entitle the debtor to relief (*k*).

2. *Transactions in which benefit has been obtained by undue influence.*—Such transactions are of two classes: (i) where influence is presumed to exist; (ii) where it must be proved to have existed (*l*).

i. Whenever parties stand in a relationship which is in law deemed to be of a confidential or fiduciary character, *e.g.*, the relationship of "principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent" (*m*) and solicitor and client (*n*), the law presumes the exercise of influence by the party in whom confidence or trust was placed (*o*). Accordingly any such transaction is voidable unless the party in the fiduciary position can prove (*a*) that the transaction was not induced by the exercise of influence but was the result of a free exercise of the will of the party from whom the benefit has been obtained, and (*b*) that it was fair and reasonable, and that he acted with the utmost good faith and made full disclosure of all the material facts (*p*). The presumption of influence may be rebutted by showing that the party from whom the benefit was received had independent legal advice, or by any other circumstances showing that he was acting independently of any influence and with full appreciation of what he was doing (*q*).

ii. Where no fiduciary relationship of such a recognised character exists the confidence and the influence must be proved

(*k*) *Samuel v. Neubold*, [1906] A. C. 461; 75 L. J. Ch. 705. As to the remaining provisions of the Moneylenders Act, 1927, see *post*, Part I, Chapter III, Section 7.

(*l*) *Smith v. Kay*, 7 H. L. C., at p. 779; 30 L. J. Ch. 45; *Allcard v. Skinner*, 36 Ch. D., at p. 171; 56 L. J. Ch. 1032; *Morley v. Loughnan*, [1898] 1 Ch., at pp. 752, 756; 62 L. J. Ch. 515.

(*m*) *Erlanger v. New Sombrero Co.*, 3 A. C., at p. 1230; 46 L. J. Ch. 73.

(*n*) *Moody v. Cor & Hatt*, [1917] 2 Ch. 71; 86 L. J. Ch. 424 (reviewing the authorities).

(*o*) *Morley v. Loughnan* (*ubi supra*).

(*p*) *Moody v. Cor & Hatt* (*ubi supra*); *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A. C. 127; 98 L. J. P. C. 1; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 340; 103 L. J. K. B. 129.

(*q*) *Inche Noriah v. Shaik Allie Bin Omar* (*ubi supra*); *Lancashire Loans, Ltd. v. Black* (*ubi supra*).

extrinsically, but where they are so proved the same rules apply (r).

Where a transaction is voidable on the ground of undue influence, it can be set aside not only as against the person exercising the undue influence but also as against any person taking an interest under the transaction with knowledge that it was induced by undue influence (s).

Thus, in *Lancashire Loans, Ltd. v. Black (t)*, a daughter was induced, as a result of undue influence exercised by her mother, to sign a joint and several promissory note to moneylenders from whom her mother was borrowing money. She did not understand the transaction and the only advice which she had was that of a solicitor who acted for her mother and the moneylenders. *Held*, that as the moneylenders had notice of the circumstances of the case they were in no better position than the mother and could not obtain judgment against the daughter upon the note.

#### SUB-SECTION 4.—Duress

When a person contracts under duress the contract is voidable (u). Duress at Common Law consists in actual or threatened violence to, or unlawful imprisonment of, the contracting party or his wife, parent or near relative, inflicted or threatened by the other party to the contract or his agent (x). But, although there was no duress in the strict Common Law sense, a contract may, in accordance with the rules of Equity, be voidable on the ground of moral coercion by undue influence, as, e.g., where a parent or wife has been induced to contract by a threat to prosecute his or her child or husband, whether or not there was any real ground for instituting a prosecution (y). And, in such cases it is not necessary that there should be a direct threat: it is enough if the contract is induced by a desire to avoid a prosecution and that desire is known to the other contracting party (z). Accordingly a contract of guarantee given by a company consisting of a father and two sons was held to be voidable where it was obtained under an implied threat to prosecute one

(r) *Smith v. Kay* (*ubi supra*).

(s) See *Morley v. Loughnan* (*ubi supra*).

(t) *Ubi supra*.

(u) *Seear v. Cohen*, 45 L. T. 589.

(x) *Bullen & Leake's Pleadings* (3rd ed.), p. 566; see also *Barnes v. Richards*, 71 L. J. K. B. 341; 86 L. T. 281; 18 T. L. R. 328.

(y) *Williams v. Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; *McLatchie v. Haslam*, 65 L. T. 691; *Kaufman v. Gerson*, [1904] 1 K. B. 591; 73 L. J. K. B. 320.

(z) *Mutual Finance, Ltd. v. Wetton & Sons, Ltd.*, [1937] 2 K. B. 220.

of the sons for an alleged forgery and the receiver of the guarantee knew that the father was so ill that his life would be endangered by a prosecution, and intended that the other son, who gave the guarantee on behalf of the company, should be influenced by fear for his father's death (a). If, however, there is no agreement to stifle a prosecution and a debt really exists, a threat to prosecute does not vitiate a subsequent agreement by the *debtor* to give security for the debt to his creditor (b).

The illegal taking and detaining of goods, or threats of injury to goods, do not constitute duress sufficient to avoid a contract (c); but money paid to recover goods unlawfully detained (d), or obtained by extortion (e), or by abuse of legal process (f) can be recovered as money had and received to the plaintiff's use, on the ground of its having been paid without any legal consideration (g).

### SECTION 2.—*Mistake*

Where in an action on a contract, one of the parties sets up *misrepresentation*, his case is that, being deceived, he entered into the contract. Where, on the other hand, he sets up *mistake*, his case is that, being deceived, he did not enter into the alleged contract (h).

One of the essentials of a contract is, as we have already seen (i), that there should be a complete and unqualified *consensus ad idem* between the parties. But, where such a consent is apparently shown by the language and conduct of the parties, neither of them may as a general rule, in the absence of any misrepresentation by the other, say that his apparent consent was due to a mistake and was not therefore a real consent.

(a) *Id.*

(b) *Flour v. Sadler*, 10 Q. B. D. 572.

(c) *Bullen & Leake (ubi supra)*; *Slater v. Deal*, 11 Ad. & El. 969; 9 L. J. Q. B. 233; 52 R. R. 558.

(d) *Green v. Duckett*, 11 Q. B. D. 275; 52 L. J. Q. B. 135; *Maskell v. Hornum*, [1915] 1 K. B. 112; 81 L. J. K. B. 1752.

(e) *Perle v. Great Western Ry.*, 7 Man. & G. 238; 18 L. J. C. P. 105; *Ismole v. Pannouratt*, 2 Q. B. 537, 11 L. J. Q. B. 79; 57 R. R. 517 (both cases of overcharges paid to carriers).

(f) *Duke de Cadaval v. Collins*, 1 Ad. & El. 558; 5 L. J. K. B. 171; 43 R. R. 499 (fraudulent use of legal process: a foreigner, ignorant of the English language, being sued by the defendant upon a claim known to the defendant to be unfounded, and paying a sum of money to obtain release from the arrest).

(g) *Id.*, pp. 72, 73.

(h) *Cundy v. Lindsay*, 1 A. C., at p. 461.

(i) *Id.*, p. 37.

There may, however, be a case in which mistake by one of the parties may prevent the existence of a *consensus ad idem*. Thus, in *Scriven v. Handley* (k), the plaintiff instructed an auctioneer to sell a number of bales of hemp and tow; the auctioneer's catalogue contained the shipping mark and the numbers of the bales in two lots: one lot was hemp and one was tow, but this was not indicated by the catalogue. The defendants bid for the tow, believing it to be hemp. *Held*, that there was no contract, because the auctioneer intended to sell tow while the purchaser intended to buy hemp and there was accordingly no *consensus ad idem*.

Moreover, when the language of the contract is ambiguous when applied to the circumstances of the case, a party may prove those circumstances in order to show that the contract which he is alleged to have made is not the contract which he intended to make. In such cases there is no contract, not because of mistake but because of the absence of *consensus ad idem*.

Thus, in *Raffles v. Wichelhaus*, there was an agreement for the sale of a cargo to arrive *ex Peerless* from Bombay. The plaintiff offered to the defendant a cargo arriving in a ship named *Peerless* which sailed from Bombay in December. The defendant refused to accept the cargo and, on being sued, pleaded that he meant a *Peerless* sailing in November. *Held*, that evidence might be given to show that two ships called *Peerless* were about to sail from Bombay and that the defendant meant one and the plaintiff another, so that there was no *consensus ad idem* (l). So also in *Falck v. Williams*, it was held that there was no contract because, through an ambiguity in the meaning of a code word in a telegram, an acceptance by the defendant as he meant it to be understood had no connection with the proposal which the plaintiff intended to make and thought that he was making (m).

Apart from such cases the fact that a person has entered into a contract as a result of a mistake does not affect his liabilities unless his mistake is due to the misrepresentation or misleading conduct of the other party to the contract or relates to some fact or matter the fulfilment of which is a condition or warranty. Thus:—

“A buys B's horse; he thinks that the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound. If B has made no representation as to soundness and

(k) [1913] 3 K. B. 564; 83 L. J. K. B. 40.

(l) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853.

(m) [1900] A. C. 176; 69 L. J. P. C. 17. Cp. *Wilding v. Sanderson*, [1897] 2 Ch., at p. 543; 66 L. J. Ch. 684.



has not contracted that the horse is sound, A is bound and cannot recover back the price."

"A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of misrepresentation or warranty."

"A agrees to take on lease or buy from B an unfurnished house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty" (n).

A bought property at an auction under a mistake that it included two pieces of garden ground. *Held*, that as the vendors did nothing to mislead him, his mistake was no defence to an action for specific performance (o).

Even at Common Law, however, there were two classes of cases in which mistake was material, *i.e.*:—

1. In certain cases a mistake *common to both parties* might prevent the *formation* of a contract;
2. Money paid under a mistake of fact might in some cases be recovered.

#### SUB-SECTION 1.—*Contracts Affected by Mistake*

The effect of misrepresentation, as has been already pointed out (p), is to render a transaction voidable, *i.e.*, good until it is avoided, so that, before it is avoided, third parties may acquire rights under it. The effect, at Common Law, of mistake, where it had any effect, was to prevent the formation of a contract, so that the transaction was absolutely *void* and third parties could not acquire rights under it. If, therefore, A obtains goods from B as the result of a mistake by B which prevents the formation of a contract, A has *no* title and can pass no title to a third party (q).

The cases in which, at Common Law, mistake prevents the formation of a contract are as follows:—

(i) Where there is a common mistake of both parties as to the existence of the subject-matter of the agreement, or of a fact which is the foundation of the contract and upon the basis of which the parties purported to contract, *e.g.*, an agreement for the sale of a life policy made under a mistaken

(n) *Bill v. Lever Brothers*, [1932] A. C., at p. 221; 101 L. J. K. B. 129.

(o) *Tamplin v. James*, 15 Ch. D. 215.

(p) *Ante*, pp. 108, 109.

(q) See *Cundy v. Lindsay*, 3 A. C. 159; 47 L. J. Q. B. 481.

belief by both parties that the assured was alive (r), or an agreement for the sale of a cargo which, at the time of the contract, was no longer in existence (s), or an agreement based upon the belief that the plaintiff was a director of a company and capable of acting as such (t).

"Corresponding to mistake as to the existence of a subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. . . . This is the case of *Cooper v. Phibbs* (u), where A agreed to take a lease of a fishery from B, though contrary to the belief of both parties at the time A was tenant for life of the fishery and B appears to have had no title at all" (x).

(ii) Where there is a common mistake by both parties as to the subject-matter of the agreement. But this rule applies only where the mistake is "as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be" (y).

Thus, in *Bell v. Lever Brothers, Ltd.* (z), the appellants had been in the service of the respondents under agreements which were to last for some years. Before the expiration of the full time it became necessary to terminate their employment and an agreement was made under which they were to receive and did receive compensation for the premature determination of their agreements. Before the compensation agreement was made the appellants had been guilty of breaches of duty for which they could have been summarily dismissed; their service agreements were consequently voidable. The respondents did not know this when the compensation agreement was made and the appellants said (and were believed by the jury) that it was not in their minds when it was made. The respondents subsequently discovered the breaches of duty and brought an action claiming the rescission of the compensation agreement and the return of the money paid under it upon the grounds (*inter alia*) of common mistake. Held, that there was no such common mistake as would render the contract void. The

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(r) *Scott v. Coulson*, [1903] 2 Ch. 249; 72 L. J. Ch. 600. In this case he contract had been actually completed by the assignment of the policy, but it was held that an assignment made under such a mistake could not be supported and that the vendor was entitled to have it rescinded. It has been already noted (*ante*, pp. 108, 109) that a different rule applies in cases of innocent misrepresentation.

(s) *Couturier v. Hastie*, 5 H. L. C. 673; 25 L. J. Ex. 253; 101 R. R. 329.

(t) In *Craven Ellis v. Canons, Ltd.* (*ante*, p. 81), this was held by Greene, J., to be an alternative ground for holding that the contract was void.

(u) L. R. 2 H. L. 149.

(x) *Bell v. Lever Brothers, Ltd.*, [1932] A. C., at p. 218. *Quære*, however, whether in these cases the contract is a nullity, not on the ground of mistake but on the ground that its performance is impossible. *Ibid.*

(y) *Bell v. Lever Brothers, Ltd.*, [1932] A. C., at p. 218.

(z) [1932] A. C. 161; 101 L. J. K. B. 129.

subject-matter of the compensation agreement was the service agreements. It was those agreements that were released and the respondents in paying for their release got exactly what they bargained for. They would not have made the bargain if they had known that the service agreements were voidable, but that fact did not affect their essential character so as to make them different in kind from the thing bargained for.

(iii) Where one party enters into an agreement through a mistake as to the identity of the other party.

Thus, in *Cundy v. Lindsay* (a), a man named Blenkarn obtained goods on credit from C, by signing his name to an order so that it looked like the signature of Blenkiron, who was a customer of C. The goods were sent by C under the belief that he was sending to Blenkiron, and not intending to contract with anyone else. Blenkarn sold the goods to X. It was held that the transaction was void, that Blenkarn had no title and could pass none to X (a).

In *Gordon v. Street* (b), a notorious moneylender, by advertising under an assumed name, induced the defendant to borrow from him when he would not have done so had he known his identity. The defence, which succeeded, was that the contract had been induced by fraudulent misrepresentation, but it was held by Smith, L.J., that, apart from fraud, the contract was void because, in the circumstances, the identity of the plaintiff was material and the defendant was in error as to the person with whom he had contracted.

In *Sowler v. Potter* (c) a woman who had been convicted of permitting disorderly conduct in a café obtained a lease of premises in the same neighbourhood. During the negotiations she concealed her identity by adopting a false name, which she assumed by deed poll shortly before the lease was granted. Held, following Smith, L.J., in *Gordon v. Street* that the lease was void.

But this rule applies only where the personality of the other party is material, so that the agreement would not have been made but for the mistake (d). It does not, therefore, apply where a seller intends to contract with a person who is present, although he would not have made the contract but for a fraudulent misrepresentation.

(a) 3 A. C. 459; 17 Ll. J. Q. B. 481. Cp. *Boulton v. Jones*, 2 H. & N. 564; 27 Ll. J. Ex. 117; 115 R. R. 695.

(b) [1890] 2 Q. B. 161; 69 Ll. J. Q. B. 15.

(c) [1910] 1 K. B. 271; 109 Ll. J. K. B. 177.

(d) *Smith v. Wheatcroft*, 9 Ch. D., at p. 230; 47 Ll. J. Ch. 745. Cp. *Said v. Butt*, [1920] 3 K. B. 497; 90 Ll. J. K. B. 239.

Thus, in *Phillips v. Brooks* (e), A went into a jeweller's shop and selected a ring and other jewels. He then produced a cheque book and wrote out a cheque. In signing it he said, "You see who I am, I am Sir G. B.", and he gave the address which the vendor, on reference to a directory, found to be the address of Sir G. B. He was allowed to take the ring, but the cheque was dishonoured, and he was subsequently convicted of obtaining the ring by false pretences. In the meantime he had pledged the ring to X, who had advanced money in good faith and without notice. It was held that the property had passed to A, so that he could give a good title to X. "There was . . . consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation."

The principle has been thus laid down (f): "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand".

The case of *Phillips v. Brooks* (*ubi supra*) has accordingly been thus explained: "A fraudulent person had entered a jeweller's shop and selected certain jewels which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that subsequently remained to be arranged was payment of the price. Horridge, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, though the title to *delivery* was voidable as having been induced by misrepresentation" (g).

(iv) Where as a result of a misrepresentation a person signs a document under a mistake as to its nature.

So, in *Foster v. Mackinnon* (h), A induced B to indorse (and so *prima facie* render himself liable upon) a bill of exchange by telling

(e) [1919] 2 K. B. 243; 88 L. J. K. B. 953.

(f) Pothier (*Traité des Obligations*, s. 19) cited by Fry, J., in *Smith v. Wheatercroft*, 9 Ch. D., at p. 230, and by Viscount Haldane in *Lake v. Simmons*, [1927] A. C., at p. 501.

(g) [1927] A. C., at pp. 501, 502.

(h) L. R. 4 C. P. 70; 38 L. J. C. P. 810.

him that he was signing a guarantee. The bill passed into the hands of C who took it as a holder for value without notice of the fraud, and therefore was *prima facie* entitled to sue B for the amount of the bill. *Held*, that B was not liable because he never intended to indorse a bill of exchange; his mind did not accompany his signature: "he never intended to sign and therefore, in contemplation of law, never did sign the contract to which his name is appended".

Again, in *Carlisle, etc., Banking Co. v. Bragg* (i), A signed a document, which was a guarantee by him to pay B & Co., who were C's bankers, any sum due to them from C on the balance of his general account. A, when sued by B. & Co., set up as his defence that C had obtained his signature by representing that the document, which he had signed without reading it, had reference to an entirely different transaction. It was held that the document was void.

This rule, however, applies only where there is a mistake as to the *nature* of the document, not where the party knows the nature of the document but is mistaken as to its effect or the nature of his obligations. "When a man knows he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, or has such confidence in his solicitor as to execute the deed in ignorance, then in my opinion a deed so executed, though it may be voidable on the ground of fraud, is not a void deed" (k).

Thus, in *Blay v. Pollard and Morris* (l), A and B were partners and agreed to dissolve on certain terms. A's father, who was a solicitor, drew up an agreement containing terms which differed from those agreed upon between A and B. B, who was unversed in business, looked through the agreement and signed it though he did not understand it. *Held*, that B could not set up the plea of *non est factum*. Although he did not understand the document or even read its exact terms, he knew that he was signing a document which regulated his rights upon the dissolution of the partnership. Accordingly it was not open to him to say that it was not his deed merely because if he had read and understood it he would have objected to its terms as being inconsistent with the agreement it was intended to carry out.

(v) Where one party to a contract is mistaken as to a term of the contract and his mistake is known to the other party.

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(i) [1911] 1 K. B. 189; 80 L. J. K. B. 472. See also *Lewis v. Clay*, 67 L. J. Q. B. 224; *Bagot v. Chapman*, [1907] 2 Ch. 222; 76 L. J. Ch. 523.

(k) *Hunter v. Walters*, L. R. 7 Ch., at p. 88; 41 L. J. Ch. 175. See also *Howatson v. Webb*, [1908] 1 Ch. 1; 77 L. J. Ch. 82.

(l) [1930] 1 K. B. 628; 99 L. J. K. B. 421.

Thus, A sees some oats in B's shop, and buys them simply as oats, thinking they are old oats, whereas, in fact, they are new oats. Here, unless there is any misrepresentation by B, the sale is good, even though B knew of A's mistake, the contract being only for *oats* and the mistake being as to the nature or quality of the subject-matter of the contract, and not as to one of the terms of the contract.

If A buys the oats thinking that B is *selling them as old oats*, i.e., that the contract is for *old oats*, the sale is still good unless B knew of A's mistake. If B did not know of the mistake, he has the right to insist that A shall be precluded from denying his apparent consent. But if B knew of the mistake, he cannot insist that A shall be bound by that which was the apparent and not the real bargain (*m*).

*Equitable relief in case of mistake.*—Equitable remedies are discretionary and their grant is governed by equitable principles. One such principle is that the remedy of specific performance may be refused to a plaintiff if great hardship would be caused to a defendant. Accordingly a Court may, on the ground of hardship, refuse to grant specific performance of a contract induced by *unilateral* mistake.

Thus, in *Webster v. Cecil*, A by letter offered to sell property to B. Through incorrectly adding up certain figures he offered it at £1,250 instead of £2,250. B accepted, knowing the mistake. *Held*, that specific performance must be refused (*n*).

So also, even when the mistake is that of the plaintiff alone, he may be granted the equitable remedy of rescission if otherwise great hardship would be caused to him (*o*).

And equitable relief may be granted against a mistake of *law*, provided that the mistake is one as to private rights only, and not as to the general law of the country. But in the absence of any other circumstance, such as misrepresentation or equitable fraud, a mere mistake as to "general law, the ordinary law of the country", is usually no ground for equitable relief (*p*).

(*m*) *Smith v. Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(*n*) 30 Beav. 62. See also *Tamplin v. James*, 15 Ch. D., at p. 221; *Preston v. Luck*, 27 Ch. D., at p. 506.

(*o*) *Goddard v. Jeffreys*, 51 L. J. Ch. 53.

(*p*) The extent of this rule is somewhat doubtful. It has been stated more than once that Equity has power to relieve against mistakes of law, in the sense of general law. See *Stone v. Godfrey*, 5 De G. M. & G., at p. 90; 23 L. J. Ch. 769; 104 R. R. 82; *Allard v. Walker*, [1896] 2 Ch. at p. 381; 65 L. J. Ch. 660; *McCarthy v. Deaux*, 2 Russ. & M., 614; 9 L. J. Ch. 180; 37

### SUB-SECTION 2.—*Money Paid under a Mistake*

Where money was paid under a mistake of fact an action for money had and received lay at Common Law on the ground that there was a total failure of consideration for the payment (q).

Thus, in *Strickland v. Turner*, A bought an annuity in ignorance of the death of the annuitant. *Held*, that he was entitled to recover back the purchase-money on the ground that there was a total failure of consideration (r).

But the payment must have been under a fundamental mistake of fact, which led the payor to suppose he was legally liable to pay (s), not under a mistake of law (t) or under threat of legal process (u).

Thus, in *Morgan v. Ashcroft* (x), a bookmaker claimed from his client a sum of £21 2s. 1d., which he alleged that he had overpaid by mistake. It was held that he could not recover it because (i) in order to ascertain whether there had been an overpayment the Court would have to examine the state of the account between the parties and this it could not do because by the Gaming Act, 1845, it was precluded from recognising wagering transactions as producing legal obligations; (ii) because there was no fundamental mistake of fact as to legal liability.

In *Moore v. Vestry of Fulham* (y), a summons had been issued against the plaintiff to enforce payment of a sum of money which was a proportionate part of the cost of making up a road and was alleged to be payable by the plaintiff as one of the owners of the abutting land. The plaintiff, in the mistaken belief that he was one of such owners, paid the amount claimed and the summons was withdrawn. Subsequently he discovered that his land did not abut on the road and in consequence he brought an action for the recovery of the money paid. It was held that he could not recover it as it was paid under pressure of legal process (z).

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R. R. 250 (approved in *Daniell v. Sinclair*, 6 A. C., at p. 191); 50 L. J. P. C. 50. The rule, moreover, does not altogether apply to money paid under a mistake of general law: see next paragraph.

(q) *Kelly v. Solari*, 9 M. & W. 51; 11 L. J. Ex. 10; 60 R. R. 666; *Huddersfield Banking Co. v. Lister*, [1895] 3 Ch., at p. 281; 64 L. J. Ch. 528; 72 L. T. 703.

(r) 7 Ex. 208; 22 L. J. Ex. 115; 86 R. R. 619. See also *Re Bodega Co.*, [1901] 1 Ch., at p. 286; 73 L. J. Ch. 198.

(s) *Re Bodega Co.*, [1901] 1 Ch., at p. 286; *Morgan v. Ashcroft*, [1938] 1 K. B. 40; 106 L. J. K. B. 514.

(t) That is to say, under mistake of English law (*Bilbie v. Lumley*, 2 East 469; 6 R. R. 179); mistake of foreign law is mistake of fact: *Leslie v. Baillie*, 2 Y. & C. 91; 12 L. J. Ch. 153; 60 R. R. 51.

(u) *Marriott v. Hampton*, 2 Esp. 516; 4 R. R. 439; *Sawyer and Vincent v. Window Brace, Ltd.*, [1913] 1 K. B. 38.

(x) *Ubi supra*.

(y) [1895] 1 Q. B. 399; 61 L. J. Q. B. 226.

(z) But money paid under mistake of law, and to avoid a threatened seizure of goods, may be recovered: *Maskell v. Horner*, [1915] 3 K. B. 112; 84 L. J. K. B. 1752. See *ante*, p. 116.

There are, however, some cases in which money paid under a mistake of fact cannot be recovered. Thus money so paid to an agent cannot be recovered if he has actually paid it to his principal (a); there are also other cases, as to which no general rule has yet been formulated (b), in which, on the ground of estoppel or breach of duty, a person who has paid money under a mistake of fact has been held disentitled to recover it (c).

Equity extended the Common Law and gives relief if, in the particular case, there is any ground which renders it inequitable that the party receiving the money should retain it (d), as, for instance—

- i. Where there was any fiduciary relationship or any supervening equity through the conduct of the parties (e).
- ii. Where the payment was to an officer of the Court, *e.g.*, to a trustee in bankruptcy (f).
- iii. Where there was any lack of good faith or any unfair advantage taken in obtaining payment (g).

So also Equity will reopen a settled account when it was settled through a misapprehension by both parties as to their legal rights (h).

#### SUB-SECTION 3.—*Mistake of Expression. Rectification*

A written contract cannot be impeached merely because one of the parties to it put an erroneous construction on the words in which it was expressed (i). But a contract which has by mistake been drawn up so as not to carry out the real intent of the parties may be rectified by putting the instrument into a form which will carry out that intent. But rectification can be obtained only upon the following conditions:—

1. The mistake must be one of expression only. “Courts of Equity do not rectify contracts, though they may and do rectify

(a) *Jones v. Waring & Gillow, Ltd.*, [1926] A. C., at p. 693; 95 L. J. K. B. 913.

(b) *Holt v. Markham*, [1923] 1 K. B., at p. 514; 92 L. J. K. B. 406.

(c) See *Jones v. Waring & Gillow, Ltd.* (*ubi supra*), where most of these cases are discussed.

(d) *Rogers v. Ingham*, 3 Ch. D., at p. 357.

(e) *Id.*, at p. 356.

(f) *Ex p. James*, L. R. 9 Ch. 609; 49 L. J. Bk. 107; *Ex p. Simmons*, 16 Q. B. D. 308; 55 L. J. Q. B. 74; *Re Thellusson*, [1919] 2 K. B. 357; 88 L. J. K. B. 1210; *Wells v. Wells*, [1911] P. 157; 83 L. J. P. 81 (reviewing the authorities).

(g) *Ward & Co. v. Wallis*, [1900] 1 Q. B. 673; 69 L. J. Q. B. 423.

(h) *Daniell v. Sinclair*, 6 A. C. 181; 50 L. J. P. C. 50.

(i) *Wilding v. Sanderson*, [1897] 2 Ch. 534; 66 L. J. Ch. 681. This principle does not, however, apply where the mistake as to the meaning of the words has been induced, although innocently, by the other party: *ibid.*



instruments purporting to have been made in pursuance of contracts" (k).

2. There must be an actually concluded contract antecedent to the instrument which is sought to be rectified (l).

This rule is commonly stated as above set out. But, in *Shipley U.D.C. v. Bradford Corporation* (m) it was held by Clauson, J., that nothing in the authorities prevented the Court from rectifying a contract so as to make it express the real intent of the parties at the time of its execution although before its execution no legally enforceable agreement existed between the parties.

3. There must be "evidence of a different intention of the clearest and most satisfactory description" (n).

4. There must be a mistake common to both parties (o).

5. The mistake must have existed at the time of the execution of the instrument (p).

6. The mistake must be exactly proved. The plaintiff must show the precise form to which the instrument ought to be brought (q).

Where rectification of a contract is sought, oral evidence is not excluded by the Statute of Frauds or any other statute requiring an agreement or memorandum in writing, because the jurisdiction of the Court to rectify is outside the prohibition of such statutes (r).

And, even where these statutes apply, rectification can be granted of a conveyance on oral evidence of a mistake although it conforms with a written agreement containing the same mistake (s). It was formerly thought that this could not be done

(k) *Mackenzie v. Coulson*, 11 R. 8 Eq., at p. 375.

(l) *Craddock Brothers v. Hunt*, [1923] 2 Ch., at p. 159; 92 L. J. Ch. 378; 129 L. T. 228; *United States v. Motor Trucks, Ltd.*, [1921] A. C., at p. 200; 93 L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 273; *Higgins, Ltd. v. Northampton Corporation*, [1927] 1 Ch. 128; 96 L. J. Ch. 98; 136 L. T. 235. In the last case it was accordingly held that there was no jurisdiction to rectify a contract under seal so as to make it agree with an antecedent oral contract which was void.

(m) [1936] 1 Ch. 375.

(n) *Fowler v. Fowler*, 1 De G. & J., at p. 261; *Vaudeville Electric Cinema, Ltd. v. Muriset*, [1923] 2 Ch. 71; 92 L. J. Ch. 538; *Craddock Brothers v. Hunt* (ubi supra).

(o) *Stewart v. Kennedy*, 15 A. C., at p. 119; *Wilding v. Sanderson*, [1897] 2 Ch., at p. 559; 66 L. J. Ch. 684; *Higgins, Ltd. v. Northampton Corporation* (ubi supra).

(p) *Fowler v. Fowler*, 1 De G. & J., at p. 261; 121 R. R. 234.

(q) *Fowler v. Fowler* (ubi supra).

(r) *United States v. Motor Trucks, Ltd.*, [1921] A. C., at p. 201; 93 L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 273.

(s) *Craddock Brothers v. Hunt*, [1923] 2 Ch. 136; 92 L. J. Ch. 378; 129

because the effect would be to grant specific performance of a contract which, as rectified by the oral evidence, would be partly in writing and partly oral. But the true explanation is that, after rectification, the written agreement does not continue to exist with an oral variation, but is to be read as if it had originally been drawn in its rectified form (t).

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(t) [1928] 2 Ch., at p. 151.

## CHAPTER III

### CAPACITY TO CONTRACT

#### SECTION 1.—*Infants*

AN infant, in the eye of the law, is a person under the age of twenty-one years, at which period he or she is said to attain majority (a). At Common Law the contracts of an infant were *voidable*, except in the case of contracts for necessities. By statute, however, some contracts of an infant have been made void, so that infants' contracts are now of three classes: some being *valid*, some being *void*, and the remainder being *voidable*.

**Valid contracts.**—An infant was, at Common Law, liable for necessities actually supplied to himself, or to his wife or children (b), and so far as concerns the sale of goods this rule has been made statutory by section 2 of the *Sale of Goods Act*, 1893, which provides that “when necessities are sold and delivered to an infant . . . he must pay a *reasonable price* therefor” (c).

The Common Law rule as to what goods are necessities was stated as follows (d): “From the earliest time . . . the word ‘necessaries’ was not confined in its strict sense to such articles as were necessary to the support of life but was extended to articles fit to maintain *the particular person* in the state, station and degree of life in which he is”.

But, “suppose the son of the richest man in the kingdom to have been supplied with diamonds and racehorses . . . such

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(a) An infant attains majority on the last day of the twenty-first year of his age: see *Re Shurcy*, [1918] 1 Ch. 263; 87 L. J. Ch. 245.

(b) *Chapple v. Cooper*, 13 M. & W., at p. 259; 18 L. J. Ex. 286; 67 R. R. 586; and see *Turner v. Trisby*, 1 Str. 168, and *Turberville v. Whitehouse*, 1 C. & P. 91.

(c) It must be noted that the statute applies only to goods “sold and delivered”, not to executory contracts, and that the infant is not bound to pay the contract price, but only a reasonable price. This confirms the Common Law principle that the liability of an infant for necessities was not strictly contractual, but quasi-contractual, being imposed by law and not by agreement: see *Re Rhodes*, 11 Ch. D. 91; 59 L. J. Ch. 298, and *Nash v. Inman*, [1908] 2 K. B., at p. 8; 77 L. J. K. B. 626. “The old course of pleading was a count for goods sold and delivered, a plea of infancy, and a replication that the goods were necessities; and then the plaintiff did not necessarily recover the price allowed, he recovered a reasonable price for the necessities”: *Pontypridd Union v. Drew*, [1927] 1 K. B., at p. 220, per Scrutton, L.J.

(d) *Peters v. Fleming*, 6 M. & W., at p. 46; 9 L. J. Ex. 81; 55 R. R. 495.

articles cannot possibly be necessities" (e). So also, expensive entertainments (f) and a collection of curios (g) and "all such articles as are purely ornamental" (h) are not necessities. In special circumstances, however, things which *prima facie* are "merely comforts or conveniences" (i) may be necessities, as, for example, horses to an infant who has been ordered by his medical adviser to take exercise on horseback (j), or luxuries that are necessary medicinally (k). The onus of establishing the existence of any such exceptional circumstances lies upon the plaintiff (l).

But even if things belonged to the class of necessities, as distinguished from luxuries, the plaintiff was at Common Law also required to show that at the time when they were supplied they were necessities to the infant (m). Accordingly the infant might, for the purpose of showing that they were not necessities, give evidence that he was already sufficiently supplied with goods of a similar description, and it was immaterial whether the plaintiff did or did not know of the existing supply (n). These Common Law rules as to what are necessities are also rendered statutory by section 2 of the *Sale of Goods Act*, 1893, which, for the purposes of the Act, defines necessities as "goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of the sale and delivery".

Thus, in the case of *Nash v. Inman* (o), an infant, who was an undergraduate at Cambridge and had just gone up to the University, was sued by a tailor for £122 19s. 6d. the price of clothes supplied to him. The defendant's father, who was an architect of good position, gave evidence that his son was supplied with clothes suitable and necessary and proper for his position in life and as an undergraduate of Trinity College, Cambridge. There was no evidence that the goods were suitable to the requirements of the infant. *Held*, that there was no evidence to go to the jury that the goods were necessities.

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(e) *Wharton v. Mackenzie*, 5 Q. B., at p. 612; 13 L. J. Q. B. 180; 64 R. R. 584.

(f) *Wharton v. Mackenzie* (*ubi supra*).

(g) *Stooks v. Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.

(h) *Peters v. Fleming*, 6 M. & W., at p. 47.

(i) *Wharton v. Mackenzie*, 5 Q. B., at p. 612.

(j) *Hart v. Prater*, 1 Jur. 628; 49 R. R. 746. Cp. *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

(k) *Bryant v. Richardson*, 14 L. T. 21. See also *Brooker v. Scott*, 11 M. & W. 27; 69 R. R. 517.

(l) *Ryder v. Wombwell*, L. R. 4 Ex., at p. 40.

(m) *Johnstone v. Marks*, 19 Q. B. D., at p. 511; 37 L. J. Q. B. 6.

(n) *Id.*, and *Barnes v. Toye*, 13 Q. B. D. 410; 52 L. J. Q. B. 567; *Nash v. Inman*, [1908] 2 K. B. 1; 77 L. J. K. B. 626.

(o) *Ubi supra*.

As in all other cases, questions of law are for the Judge; questions of fact are for the jury; but questions of fact ought not to be left to the jury unless there is evidence upon which they can *reasonably* find in the affirmative. Whether or not goods are "necessaries" is a question of fact for the jury, but there is in every case a preliminary question which is one of law, *viz.*, whether there is any evidence on which the jury may properly find them to be necessaries, and in the absence of such evidence the Judge ought to withdraw the case from the jury and find for the defendant. The Judge therefore ought to withdraw the case from the jury either (i) where the goods are of such a kind that they cannot possibly be necessaries; or (ii) where the goods can be necessaries only by reason of exceptional circumstances, of which there is no evidence; or (iii) where there is no evidence that the goods were necessary to the actual requirements of the infant (p).

Contracts for necessaries are not, however, limited to contracts for goods, but include contracts for work and labour done for the infant, or services rendered to him, as, *e.g.*, medical attendance, and also *executory* contracts for "education and instruction in the social state in which the infant is, and in which he may expect to find himself when he becomes an adult" (q).

Thus, in *Roberts v. Gray* (r), it was held that an infant was bound by a contract which he had made to go on a tour with a well-known professional billiard player, an essential feature of the agreement being the valuable instruction that he would obtain from continually playing with the plaintiff, his own intention being to become a professional billiard player.

And an infant's contract for service or employment is binding upon him if, upon the consideration of the whole contract, it is for his benefit, even though it contains terms that, standing alone, would not be for his advantage (s).

(p) *Ryder v. Wombell* (*ubi supra*); *Nash v. Inman* (*ubi supra*). The opinions of Judges as to what may be necessaries have, however, varied with the course of time and will probably continue to vary.

(q) *Roberts v. Gray*, [1913] 1 K. B., at p. 326. See also *Walter v. Everett*, [1591] 2 Q. B. 369; 60 L. J. Q. B. 738. A marriage settlement may also be a necessary. *Helfs v. Clayton* 17 C. B. (N.S.) 533; 34 L. J. C. P. 1; 142 R. R. 513.

(r) [1913] 1 K. B. 320; 82 L. J. K. B. 362.

(s) *Corn v. Matthews*, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; *Clements v. London and North Western Ry.*, [1894] 2 Q. B. 482; 63 L. J. Q. B. 837; *Green v. Thompson*, [1599] 2 Q. B. 1; 68 L. J. Q. B. 719; *Roberts v. Gray* (*ubi supra*); *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 113; 104 L. J. K. B. 140.

In the case of *Doyle v. White City Stadium, Ltd.* (t), it was held that this principle applied to a contract under which an infant boxer entered into a boxing contest, the contract being an essential in practice to him for obtaining employment as a professional boxer.

But a mere trading contract is not binding upon an infant merely because it is for his benefit (u). So, where an infant who was carrying on business as a haulage contractor entered into a hire-purchase agreement in respect of a motor lorry, it was held that such a contract was not one of the class by which an infant can be bound (w).

The liability of an infant for necessities is only as on simple contract. If, therefore, an infant enters into a covenant under seal for the payment of the price of necessities, he cannot be sued simply upon the covenant without any inquiry into the consideration for it, but the case must be treated just as if there had been no deed (x). So also an infant cannot be sued upon his covenant to serve contained in an apprenticeship deed (y); but where an infant has by a fair and reasonable apprenticeship deed covenanted to pay a premium, he may be sued for the premium in the same way as if it were the price of necessities, and the fact that he has entered into a covenant under seal does not prevent him from being liable (z). But the rule that an infant cannot be sued upon a covenant to serve contained in an apprenticeship deed applies only to covenants which it is sought to enforce during the apprenticeship; it does not prevent the enforcement of a covenant to do or abstain from doing something after the apprenticeship has ceased, e.g., a fair and reasonable restrictive covenant (a).

An infant was not at Common Law liable to repay money lent for the purpose of buying necessities, and even a deed given by an infant to secure the repayment of such money was not

(t) *Ubi supra*.

(u) *Cowern v. Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865; see also *Ex p. Jones*, 18 Ch. D. 109; 50 L. J. Ch. 673.

(w) *Mercantile Union Guarantee Corporation v. Ball*, [1937] 2 K. B. 498; 106 L. J. K. B. 621.

(x) *Walter v. Everard*, [1891] 2 Q. B., at pp. 372, 373; 60 L. J. Q. B. 738; and see *Martin v. Gale*, 4 Ch. D. 128; 46 L. J. Ch. 81.

(y) *Gilbert v. Fletcher* (1630), Cro. Car. 179. But "if he misbehave himself, the master may correct him in his service, or complain to a justice of the peace to have him punished": *ibid.* See also *De Francisco v. Barnum*, 48 Ch. D. 165; 59 L. J. Ch. 151.

(z) *Walter v. Everard* (*ubi supra*). But an infant's parents or friends who have covenanted to pay a premium may be sued upon their covenant: *ibid.*

(a) *Gadd v. Thompson*, [1911] 1 K. B. 301; 80 L. J. K. B. 272. See also *Bromley v. Smith*, [1909] 2 K. B. 235.

binding upon him (b); but in Equity, if money lent to an infant was spent in payment for necessities, the lender stood in the place of the creditor whose debt had been paid, and could recover from the infant in Equity as the creditor might have done at law (c). And when a person advances money to an infant to enable him to buy land, and the money is so applied, the lender is entitled to stand in the place of the vendor and to enforce the vendor's lien upon the land (d).

An infant is not liable upon a bill of exchange or promissory note to which he was a party, though it was given for necessities, but must be sued on the consideration for which it was given, i.e. the original debt for the necessities (e).

Children have no implied authority to act as agents for their parents, even for the supply of necessities; and in order to charge a parent for the price of necessities supplied to an infant child it is necessary to show that they were supplied either by the authority or with the assent of the parent (f), though such authority or assent may be inferred from slight evidence (g).

**Void contracts.**—All contracts of an infant other than for necessities were at Common Law voidable. But by statute certain contracts have been made void.

By s. 1 of the *Infants Relief Act*, 1874, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent (h), or for goods supplied or to be supplied (i) (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void (k): provided always, that this

(b) *Marlin v. Gule*, *ubi supra*.

(c) *Marlow v. Pitfield*, 1 P. Wms. 558; *Re National Permanent, etc., Society*, L. R. 5 Ch., at p. 313. The same rule applies to loans to a lunatic.

(d) *Nottingham, etc., Building Society v. Thurstan*, [1903] A. C. 6; 72 L. J. (Ch. 131).

(e) *Re Soltykoff, ex p. Margrett*, [1891] 1 Q. B. 113; 60 L. J. Q. B. 389.

(f) *Shilton v. Springett*, 11 C. B. 452; *Rolfe v. Abbott*, 6 C. & P. 286.

(g) *Laur v. Wilkin*, 6 Ad. & El. 718; 6 L. J. K. B. 166; *Baker v. Keen*, 2 Stark. 501. Both these cases are, however, doubted in *Shelton v. Springett* (*ubi supra*).

(h) See *Nottingham, etc., Society v. Thurstan* (*ubi supra*). But where a father and son were sued on a promissory note given in respect of a loan to the son, who was an infant, the father having joined in the note as a guarantor, it was held that the guarantee was good and the father was liable as guarantor: *Wauthier v. Wilson*, 27 T. L. R. 582.

(i) A contract for the exchange of goods comes within the words "goods supplied or to be supplied": *Pierce v. Bram*, [1929] 2 K. B. 310; 98 L. J. K. B. 559.

(k) It has, however, been held that when goods have been actually delivered to the infant the property in them passes to the infant. *Stooks v. Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.

enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable". The same statute (l) also makes unenforceable all promises made after full age to pay any debt contracted during infancy, and all ratifications after full age of contracts made during infancy; and so far as concerns loans contracted during infancy, its provisions have been extended by the *Betting and Loans (Infants) Act, 1892 (m)*.

**Voidable contracts.**—All other contracts by an infant are voidable by him. The rule as to such a contract has been laid down as follows: "Has he to ratify it, or is it binding upon him until he elects to avoid it? It appears to me that this point has been long settled by authority. It is binding upon him until he repudiates it. Further, I take it, the law is well settled that he must repudiate it, if at all, within a reasonable time after he attains twenty-one" (n).

If a voidable contract is not repudiated within a reasonable time, the right to repudiate is lost, but it cannot be lost by any positive *ratification (o)*. Before 1874 the rule was different, and an infant might by ratification lose his power to repudiate. But by the *Infants Relief Act, 1874 (p)*, it is provided that "no action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, *whether there shall or shall not be any new consideration for such promise or ratification after full age*". Under this Act, accordingly, no contract of any kind is capable of ratification (q). By s. 5 of the *Betting and Loans (Infants) Act, 1892*, it is further provided that if any infant who has contracted a loan which is void in law agrees, after he comes of age, to pay any money which represents or is agreed to be paid in respect of such loan, and is not a new advance, such agreement and any instrument, negotiable or

(l) S. 2, see *infra*.

(m) *Infra*.

(n) *Carter v. Silber*, [1892] 2 Ch., at p. 284; 61 L. J. Ch. 401. Affirmed *sub nom. Edwards v. Carter*, [1893] A. C. 360; 63 L. J. Ch. 100. See also *Carnell v. Harrison*, [1916] 1 Ch. 328; 85 L. J. Ch. 321.

(o) To this, however, there is an exception in certain cases which depend upon the doctrine of *equitable election*: see *Re Hodson's Settlement, Williams v. Knight*, [1894] 2 Ch. 421; 63 L. J. Ch. 609; 71 L. T. 77. As to ratification, see further, *post*, p. 135.

(p) S. 2.

(q) See *Smith v. King*, [1892] 2 Q. B. 543; 67 L. T. 420.



other, given in pursuance of or for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan, shall be void absolutely as against all persons whomsoever.

Where, however, "a person is sued upon obligations arising out of *property* which he has become possessed of under a contract, as shares in a company, he cannot avoid the obligation by the simple defence that he was an infant at the time of acquiring the property, he must further plead that before coming of age or within a reasonable time in that behalf after coming of age he repudiated the contract on that ground *and disclaimed the property*" (r). Thus an infant lessee who has taken possession cannot after attaining full age avoid his obligation to pay rent, unless before attaining full age or within a reasonable time afterwards he has disclaimed his interest in the lease (s). So also a person who during infancy becomes a shareholder in a company is liable for calls unless he has repudiated the shares (t).

And where an infant has actually paid money under a contract, whether voidable or void, and has received some benefit under the contract, so that he cannot replace the other party in the position in which he was before the contract, the infant cannot recover the money which he has paid (u).

Thus, in the case of *Talentini v. Canali* (x), an infant agreed to become tenant of a house and to pay the landlord £102 for the furniture. He paid £68, gave a promissory note for the balance, and occupied the house and used the furniture for several months. He then brought an action, claiming (i) a declaration that the contract was void, and (ii) the return of the £68. It was held that the contract was void, and the promissory note was ordered to be cancelled; but it was also held that the infant could not obtain repayment of the £68, because he had had the use of the furniture for some time and he could not give back this benefit or restore the defendant to the position in which he was before the contract.

So, also, unless there is a complete failure of consideration,

(r) *Curter v. Silber* (*ubi supra*). So also a person who during infancy becomes a shareholder in a company is liable for calls unless he has repudiated the shares. As to infant partners, see *post*, Part III, Chapter I.

(s) *London and North Western Ry. v. McMichael*, 20 L. J. Ex., at p. 101; 5 Ex. 111. This principle is not affected by the fact that under ss. 1 (6) and 19 of the Law of Property Act, 1925, and s. 27 (1) of the Settled Land Act, 1925, a conveyance of land to an infant operates only as an agreement to execute a settlement in his favour: *Davies v. Beynon Harris*, 171 L. T. 438; 47 T. L. R. 421.

(t) *London and North Western Ry. v. McMichael* (*supra*).

(u) *Holmes v. Bloqq*, 8 Taunt. 508; 19 R. R. 445, as explained by *Corpe v. Overton* (*infra*).

(x) 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731.

an infant cannot recover a chattel which he has transferred under a void contract.

Thus, in *Pearce v. Brain* (y), an infant exchanged his motor cycle for a motor car belonging to the defendant. After five days' use of the car he discovered a defect in the back axle and repudiated the contract and claimed the return of his motor cycle. It was held that, as there was not a total failure of consideration, he could not recover his motor cycle.

But where an infant has received no benefit, so that there is a total failure of consideration, he can recover money paid under a void or voidable contract (z).

The infancy of one party to a contract does not affect the liability of the other party, so that, although an infant may not be liable upon a contract, he may be able to enforce it against the other party (a); but he cannot, as a general rule, maintain an action for specific performance of a contract because, subject to certain exceptions, a decree for specific performance cannot be obtained by a party against whom it could not be decreed (b). Where an infant is a partner in a firm judgment for the price of goods supplied to the firm cannot be recovered simply against the firm but must be against the firm other than the infant (c).

**Contracts of marriage.**—A contract to marry is voidable by an infant, but he may become liable by a fresh promise made after coming of age and for a fresh consideration, though not by a mere ratification (d). Where there has been an express promise of marriage during infancy and the only subsequent evidence is of conduct on the part of the engaged couple consisting of continuing to treat one another as an engaged couple,

(u) See ante, p. 132, n. (i).

(z) *Corpe v. Overton*, 10 Bing. 252; 3 L. J. C. P. 24; 38 R. R. 422; *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452; 92 L. J. K. B. 941; 129 L. T. 624; 39 T. L. R. 542, overruling, unless distinguishable on the facts, *Hamilton v. Vaughan Sherrin Electrical Co.*, [1894] 3 Ch. 589; 68 L. J. Ch. 795; 71 L. T. 325.

(a) *Nash v. Inman*, [1908] 2 K. B., at p. 11; 77 L. J. K. B. 626; 98 L. T. 658. *Quære* whether contracts which are void under the Infants Relief Act, 1874, can be enforced by the infant.

(b) *Flight v. Bolland*, 4 Russ. 298; 28 R. R. 101; *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683; 61 L. J. Q. B. 441.

(c) *Lovell & Christmas v. Beauchamp*, [1891] A. C. 607; 63 L. J. Q. B. 802.

(d) *Ditcham v. Worrell*, 5 C. P. D., at p. 412; 49 L. J. C. P. 688. "A ratification necessarily has reference to the past, and . . . is simply an intentional recognition of some previous promise made . . . and an adoption and confirmation of such promise with the intention of rendering it binding . . . . There may or may not be any consideration for a ratification, but there must be a consideration for a new and independent promise": *ibid.*

without any evidence of words capable of being construed as a fresh promise, such conduct is mere evidence of ratification (e). But where there is evidence, not merely of such conduct, but that the defendant used language capable of being construed as a fresh promise, it is for the jury to find whether the words so used amount merely to a ratification of the promise made during infancy or whether they prove a fresh and independent agreement (f), in which the consideration for the new promise by the defendant is a new reciprocal promise by the plaintiff.

Thus, in *Ditcham v. Worrall* (g), the defendant, after coming of age, asked the plaintiff to fix the wedding day, which she did. It was held that this was a fresh agreement, the consideration for the defendant's promise being the willingness of the plaintiff to marry as expressed when she fixed the day for the wedding.

In *Northcote v. Doughty* (h), however, the defendant, after coming of age, said to the plaintiff: "Now I may and will marry you as soon as I can", to which she assented. Held, that the question whether this was or was not a new promise was properly left to the jury.

**Equitable liability of infants.**—At Common Law it was no answer to a plea of infancy that the defendant, in making the contract, had fraudulently misrepresented himself to be of full age (i); nor can an infant, at Common Law, be liable in tort on the ground that he has by such a fraudulent misrepresentation induced another party to contract with him (k); nor is he, in such a case, estopped from setting up that a contract made by him is void (l).

But, "when an infant obtained an advantage by falsely stating himself to be of full age, Equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a *contractual* obligation, entered into while he was an infant, even by means of a fraud" (m).

Thus, in *Clarke v. Cobley* (n), an infant was ordered to return promissory notes, the surrender of which he had procured by falsely

(e) *Corthead v. Mullis*, 3 C. P. D. 189; 47 L. J. C. P. 761.

(f) *Northcote v. Doughty*, 1 C. P. D. 385.

(g) *Ubi supra*.

(h) *Ubi supra*.

(i) *Bartlett v. Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57; 124 R. R. 774.

(k) *Johnson v. Pim* 1 Sid. 278. *R. Leslie Ltd. v. Shiell* [1914] 3 K. B., at p. 612.

(l) *Levene v. Broadham*, 25 T. L. R. 265.

(m) *R. Leslie, Ltd. v. Shiell* [1914] 3 K. B., at p. 616.

(n) 2 Cox 173. 2 R. R. 25.

stating that he was of age, though a decree against him to pay the amount of the notes, although he had become of age, was expressly refused.

And in *Lempriere v. Lange* (o), where an infant obtained a lease of a furnished house upon an implied representation that he was of age, it was held that, though the lease must be declared void and possession must be given up, yet the infant was not liable for use and occupation.

So, also, where an infant has by fraud obtained property which he has sold, so that he cannot return it, he may be liable in Equity to account for the proceeds (p). But the remedy in Equity is only proprietary, and if there is no possibility of restoring the very thing obtained or its actual and traceable proceeds, the infant cannot be made liable by a judgment *in personam* for a sum equivalent to that which he has gained by his fraud.

Accordingly, in *R. Leslie, Ltd. v. Shiell* (q), where an infant, by a fraudulent misrepresentation as to his age, obtained a loan of money which was paid to him to be used as his own and was so used, it was held that no action would lie against him to recover the amount of the advances on the ground that they had been obtained by fraudulent misrepresentation, or, in the alternative, for money had and received to the use of the plaintiff, the cause of action in either case being in substance *ex contractu*. It was further held that the defendant was under no equitable liability to the plaintiff, because there was no question of accounting and no possibility of restoring or tracing the very thing got by the fraud, so that any judgment would be a personal judgment to pay an equivalent sum and so merely a judgment in debt to repay the loan, thus enforcing a void contract.

## SECTION 2.—Married Women

### SUB-SECTION 1.—The Law before 1935

*Contracts made during marriage.*—At Common Law a married woman, though she could contract as agent for her husband, could not in general acquire any personal rights or incur any personal liabilities by her contracts. By her marriage, her legal personality merged, for most purposes, in that of her husband, to whom, during her coverture, her property and rights passed,

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(o) 12 Ch. D. 675.

(p) *Stocks v. Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598, but see *R. Leslie, Ltd. v. Shiell*, [1914] 3 K. B., at p. 619.

(q) *Ubi supra*.

and who became liable, jointly with her, for her torts, and, solely, upon contracts made by her as his agent (r).

Even at Common Law, however, there were exceptional cases in which a married woman could contract and sue or be sued as a *feme sole*, namely: (i) when her husband was civilly dead, as, e.g., while he was under sentence of transportation (s); or (ii) by the custom of the City of London, when she was the wife of a freeman and carried on trade separately from her husband (t); or (iii) when the contract was the compromise of any legal proceedings which a husband and wife were by law capable of taking against each other, as, e.g., proceedings for separation (u).

Further exceptions were also added by statute.

By the *Matrimonial Causes Act*, 1857, a wife deserted by her husband was enabled to obtain a protection order, during the continuance of which she was in the same position with regard to her subsequently acquired property and her contracts, and suing and being sued, as if she were a *feme sole* (w). And by the same Act a woman judicially separated from her husband was in a similar position (x).

By the *Matrimonial Causes Act*, 1878 (y), a separation order obtained under the Act from a Court of summary jurisdiction was given the same effect as a decree for judicial separation.

Apart from the foregoing exceptions at Common Law and by statute, a married woman could, before 1935, contract only with respect to her separate property.

*Contracts with respect to separate property.*—In Equity it was settled in modern times that property might be given to a married woman for her *separate use*, and that with respect to such *equitable* separate property she had all the rights and powers of a person who was *sui juris* (z). But a gift of property to the

(r) *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43. See also *Johnson v. Clark*, [1908] 1 Ch., at p. 312; 77 L. J. Ch. 127.

(s) See Bullen & Leake (3rd ed.), p. 598; *Ex p. Franks*, 7 Bing. 762; *Ex p. Jones, re Grissell*, 12 Ch. D., at p. 488.

(t) *Ex p. Jones, re Grissell* (*ubi supra*).

(u) *McGregor v. McGregor*, 21 Q. B. D., at p. 430; 57 L. J. Q. B. 591.

(w) S. 21 (repealed so far as concerns the High Court by s. 226 of the Judicature Act, 1925).

(x) Ss. 25 and 26, replaced by s. 191 (1) of the Judicature Act, 1925, for which a new subsection has been substituted by the Law Reform (Married Women and Tortfeasors) Act, 1935.

(y) S. 1, replaced by s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, and amended as to the grounds on which such an order may be made by the Licensing Act, 1902, and the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

(z) *Taylor v. Mordaunt*, 4 De J. & S., at p. 608; 84 L. J. Ch. 203; 146 R. R. 171.

separate use of a married woman might be qualified by a provision restraining her from anticipating or alienating the capital or income of such separate property.

Subject to any such restraint, a married woman might contract with regard to her separate property as a *feme sole* and not as agent for her husband: whether she did so contract depended upon the facts of each particular case (a). But the sole remedy of her creditors was against her separate estate; she was not personally liable and could not be sued alone (b).

The Married Women's Property Acts enabled a married woman to have legal separate property and to contract in respect thereof.

By the *Married Women's Property Act*, 1870, it was provided that certain kinds of property belonging to a married woman should be deemed to be held by her to her separate use, and she was given certain powers of suing in her own name.

By the *Married Women's Property Act*, 1882, a married woman was made capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a *feme sole*, without the joinder of her husband as plaintiff or defendant (c). She was also given, as against all persons, including her own husband, the same civil remedies for the protection of her separate property, as if such property belonged to her as a *feme sole*, but it was provided that, except as aforesaid, no husband or wife should be entitled to sue the other for a tort (d).

Separate property under the Act comprised

- i. In case of a woman married after 1882—all property belonging to her at marriage, or acquired by her or devolving upon her after marriage (e):
- ii. In case of a woman married before 1882—all property her title to which accrued after 1882 (f).

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(a) *Johnson v. Gallacher*, 3 De G. F. & J. 502; 30 L. J. Ch. 298; 108 R. R. 228; *Mrs. Matthewman's Case*, L. R. 3 Eq. 787; 36 L. J. Ch. 90.

(b) *Aitwood v. Chichester*, 3 Q. B. D. 722; 47 L. J. Q. B. 300.

(c) S. 1 (2), now repealed.

(d) *Id.*, s. 12, now amended by the Second Schedule to the Law Reform (Married Women and Tortfeasors) Act, 1935, by deleting the word "separate" before "property" and by the First Schedule, by substituting for the words "such property belonged to her as" the words "she were". "One cannot help, if one is of a frivolous turn of mind, speculating how far the Legislature, when it passed that, knew exactly what the effect of its operation was": *Chant v. Read*, [1939] 2 K. B., at p. 358.

(e) *Id.*, s. 2, now repealed.

(f) *Id.*, s. 5, now repealed.

The *Married Women's Property Act*, 1898, removed certain difficulties caused by the Act of 1882, and provided (g) that every contract thereafter entered into by a married woman *otherwise than as agent*—

- i. Should be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she was or was not in fact possessed of or entitled to any separate property at the time when she entered into such contract (h);
- ii. Should bind all separate property which she might at that time or thereafter be possessed of or entitled to; and
- iii. Should also be enforceable by process of law against all property which she might thereafter, while discovert, be possessed of or entitled to.

By the same section it was, however, provided that nothing should render available to satisfy any liability or obligation arising out of such contract any property which at that time or thereafter she was restrained from anticipating. If, therefore, at the date of the contract the married woman was restrained from anticipating any separate property, whether capital or income, it could not be made liable even if it became free from restraint before judgment (i). The restraint ceased only when she became discovert, or in case of income, when it was due and payable to her (k). It might, however, in certain cases be removed by the Court (l).

Accordingly, in any action brought against a married woman by virtue of these Acts her creditor could obtain satisfaction only out of her separate property and not otherwise (m). She was subject only to a proprietary liability; the judgment created no debt due from her personally within the meaning of s. 5 of the Debtors Act, 1869 (n), and she could not, therefore,

(g) S. 1, *now repealed*.

(h) Under the Act of 1882 a married woman might prove that she had not in fact contracted with regard to her separate property, and her subsequently acquired separate property was not liable unless she had some separate property at the time of the contract.

(i) *Barnett v. Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Brown v. Dumbleby*, [1901] 1 K. B. 28; 73 L. J. K. B. 35; *Wood v. Lewis*, [1914] 3 K. B. 73; 83 L. J. K. B. 1046.

(k) See *Wood v. Lewis* (*ubi supra*).

(l) *E.g.*, under s. 2 of the Married Women's Property Act, 1898 (*now repealed*), for the payment of the costs of proceedings instituted by her, and under s. 169 of the Law of Property Act, 1925, where it appears to the Court to be for her benefit.

(m) *Married Women's Property Act*, 1882, s. 1 (2) (*now repealed*).

(n) See *post*, Part II, Chapter V.

on non-payment be committed upon a judgment summons under that Act (o).

### Antenuptial Contracts.

A. *Rights*.—If a woman had, before her marriage, any right under a contract, such right, being a *chose in action*, passed at Common Law to her husband if it was reduced into possession by him during the coverture, as, for instance, by actual payment or transfer to him or by his obtaining judgment for it in his own name; if, however, the husband died without reducing into possession the wife's *choses in action*, they survived to her (p).

But by the *Married Women's Property Act*, 1882 (q), all *choses in action* belonging to a woman at the date of her marriage, if married after 1882, or acquired by any married woman after 1882, were made her legal separate property.

B. *Liabilities*.—For her antenuptial contracts a married woman was at Common Law *personally liable*, and this liability was unaffected by the *Married Women's Property Acts*, so that, in respect of such contracts, a *personal* judgment could be obtained against her (r). By the *Married Women's Property Act*, 1882, she was *also* made liable in respect and to the extent of her separate property (s), but by s. 19 judgment could not be enforced against her separate property which was subject to a restraint against anticipation unless the restraint was contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself (t).

Her husband was at Common Law liable, *jointly* with her, for her antenuptial contracts (u). But, after some modifications of this liability by earlier statutes, it was provided by the *Married Women's Property Act*, 1882 (x) that a husband should be liable for his wife's antenuptial contracts only to the extent of any property acquired from or through her.

(o) *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43.

(p) See *Gates v. Madeley*, 6 M. & W. 423; *Scarpellini v. Atcheson*, 7 Q. B. 864; 11 L. J. Q. B. 338.

(q) S. 5 (*now repealed*).

(r) *Robinson, King & Co. v. Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 19; see also *Scott v. Morley* (*ubi supra*).

(s) S. 13 (*now amended by the Second Schedule to the Law Reform (Married Women and Tortfeasors) Act, 1935, deleting the words "in respect and to the extent of her separate property"*).

(t) *Birmingham Excelsior Society v. Lane*, [1904] 1 K. B. 35; 73 L. J. K. B. 28.

(u) *Bullen & Leake* (3rd. ed.), p. 171, *Beck v. Pierce*, 23 Q. B. D., at p. 320; 58 L. J. Q. B. 516; 61 L. T. 118.

(x) S. 14 (*now repealed by the Second Schedule to the Act of 1935*).



SUB-SECTION 2.—*The Modern Law*

By Part 1 of the *Law Reform (Married Women and Tortfeasors) Act, 1935*, the position of married women has been entirely changed.

By s. 1 of the Act it is provided that, subject to the provisions of this Part of the Act, and, subject as respects actions in tort between husband and wife, to s. 12 of the *Married Women's Property Act, 1882* (*ante*, p. 139), a married woman shall—

- (a) be capable of acquiring, holding, and disposing of any property; and
- (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation; and
- (c) be capable of suing and being sued, either in tort or in contract or otherwise; and
- (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders,

in all respects as if she were a *feme sole*.

By s. 2 of the Act it is provided that, subject to the provisions of this Part of the Act, all property which—

- (a) immediately before the passing of the Act was the separate property of a married woman or held for her separate use in equity; or
- (b) belongs at the time of her marriage to a woman married after the passing of the Act; or
- (c) after the passing of the Act is acquired by or devolves upon a married woman,

shall belong to her in all respects, as if she were a *feme sole* and may be disposed of accordingly (1).

By the First Schedule to the Act a new sub-section is substituted for s. 194 of the *Judicature Act, 1925*, providing that, in every case of judicial separation, so long as the separation continues, any property acquired by or devolving on the wife shall not be affected by any restraint on anticipation attached to the enjoyment of any property by her under any settlement, will, or other instrument; and, if she dies intestate, shall devolve as if her husband were then dead.

By s. 3 of the Act it is provided that, subject to the provisions of this Part of the Act, the husband of a married woman shall not, by reason only of his being her husband, be liable in respect of any contract entered into, or debt or obligation

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(1) But by s. 1 of the Act it is provided that during a coverture which began before 1883, nothing in this Part of the Act shall affect any property to which the title of a married woman accrued before that date, except property held for her separate use in equity.

incurred by her before the marriage, or be sued or be made a party to any legal proceeding in respect thereof.

By s. 4 nothing in this Part of the Act shall enable any judgment or order against a married woman in respect of an antenuptial contract, debt or obligation incurred before the passing of the Act to be enforced otherwise than against her property. The same section also provides that nothing in this Part of the Act shall exempt the husband of a married woman from liability in respect of any contract entered into, or debt or obligation (not arising out of the commission of a tort) incurred by her after the marriage, in respect of which he would have been liable but for the Act.

By the *Married Women (Restraint upon Anticipation) Act, 1949*, any restraint upon anticipation is inoperative.

By s. 1 (1) of the Act it is provided that no restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act (z).

The effect of the Acts of 1935 and 1949 is that a married woman is, in respect of her contracts, in the same position and subject to the same liabilities as if she were a *feme sole*.

"Protective trusts" may be attached to her enjoyment of the income of property in the same way as they may be attached to the enjoyment of property by a man (a).

### SECTION 3.—*Persons of Unsound Mind or Drunk*

An idiot is a person who is insane from birth, without any lucid intervals; a lunatic is a person who by some cause has become insane, either totally or partially, and either with or without lucid intervals.

The general rule is that the contract of a person who is so insane (b) or drunk (c) as not to be capable of understanding the transaction is *voidable* if he can prove that the person with whom he contracted knew of his condition at the time of the contract. But a lunatic, even though so found by inquisition, can make a valid contract during a lucid interval (d). And, at Common

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(z) Sub-section (2) repeals the proviso in s. 2, sub-section (1) and sub-sections (2) and (3) of the Act of 1935, which relate to instruments attaching a restriction before January 1, 1936.

(a) As to protective trusts, see s. 33 of the Trustee Act, 1925.

(b) *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; 61 L. J. Q. B. 119; 66 L. T. 556. See also *York Glass Co. v. Jubb*, 131 L. T. 36.

(c) *Matthews v. Darter*, L. R. 8 Ex. 132; 42 L. J. Ex. 73.

(d) *Hall v. Warren*, 9 Ves., at p. 609; 7 R. R. 306.

Law, whenever necessaries are supplied, or money is spent for their supply, to a person who by reason of disability cannot contract, the law implies an obligation on his part to pay for such necessaries out of his own property, provided that the provision of such money or necessaries is made under circumstances which would justify the Court in implying such an obligation to repay (e).

This rule is now embodied in s. 2 of the *Sale of Goods Act*, 1893, which provides that when "necessaries" as therein defined (f) "are sold and delivered to . . . a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor".

The mere existence of a delusion in the mind of a contracting party, even though connected with the subject-matter of the contract, is not sufficient to avoid the contract unless it is found as a fact that it affected his competency to make the particular contract (g).

#### SECTION 4.—Convicts

A "convict", that is to say, a person against whom judgment of death or of preventive detention or corrective training has been pronounced or recorded upon any charge of treason or felony, cannot, during the continuance of his sentence, bring any action for the recovery of any property, debt or damage, or alienate or charge any property, or make any contract, except while lawfully at large under any licence (h).

#### SECTION 5.—Aliens

An alien is defined by the *British Nationality and Status of Aliens Act*, 1914 to 1948, as a person who either is not a natural-born British subject or has not been granted a certificate of naturalisation (i). By s. 3 (8) of the *British Nationality Act*, 1948, the expression "alien" where used in the *Aliens Restriction Acts*, 1914 and 1919, shall not include a British protected person. "Alien" is defined in the Act of 1948, s. 32, as a person who is not a British subject, a British protected person or a

(e) *Re Rhodes, Rhodes v Rhodes*, 11 Ch. D. 94; 59 L. J. Ch. 298. In this case the Court refused to imply such an obligation because money expended for the lunatic was not so expended with any intention on the part of the person who provided it that he should be repaid, and the constitution of any debt between himself and the lunatic was not contemplated.

(f) *Ibid.*, p. 129.

(g) *Jenkins v. Morris*, 11 Ch. D. 972, 15 L. T. 589.

(h) *Forfeiture Act* 1870 ss. 6-8, 20, as amended by the *Criminal Justice Act*, 1918, 9th Schedule.

(i) 1 & 5 Geo. 5, c. 17, s. 27.

citizen of Eire. A "British protected person", by s. 82, means a person who is a member of a class of persons declared by Order in Council made in relation to any protectorate, protected state, mandated territory or trust territory to be for the purposes of this Act British protected persons by virtue of their connection with that protectorate, state or territory.

An alien friend resident in this country has, generally speaking, all the civil rights of a British subject, including the right to contract, the right to sue in the King's Courts (*k*), and the right to hold real and personal property of every description, except a British ship (*l*).

*Alien enemies.*—The term "alien enemy" indicates, in its natural meaning, a subject of enemy nationality, that is, of a State at war with the King; but, in considering the enforcement of civil rights, the test is not nationality but residence or place of business, and accordingly a person voluntarily resident in or carrying on business in an enemy country is treated as an alien enemy, though he is a subject of the British Crown or of a neutral State: and conversely, the subject of a State at war with this country but who is carrying on business here or in a foreign neutral country is not treated as an alien enemy (*m*).

An alien enemy, unless here by the licence or under the protection of the Crown (*n*), cannot sue or proceed in the civil Courts of the realm, his rights being suspended during the war (*o*). But, if effective notice of the proceedings can be served upon him, he can be sued and proceeded against during the war, and can take all steps necessary for his defence and can appeal, unless before the war judgment was given against him in an action in which he was plaintiff, in which case his right to appeal is suspended (*p*).

(*k*) *Porter v. Freudenberg*, [1915] 1 K. B., at p. 869; 84 L. J. K. B. 1001; 31 T. L. R. 162; *Johnstone v. Pedlar*, [1921] 2 A. C., at pp. 276, 277; 90 L. J. P. C. 131; 125 L. T. 809; 37 T. L. R. 870.

(*l*) 1 & 5 Geo. 3, c. 17, s. 17. Aliens are, however, under the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, subject to certain restrictions.

(*m*) *Porter v. Freudenberg*, [1915] 1 K. B., at pp. 867-869; 84 L. J. K. B. 1001. As to companies, see *Daimler Company, Ltd. v. Continental Tyre, etc.*, ([1916] 2 A. C. 307; 85 L. J. K. B. 1333; 111 L. T. 1019. For the tests of "enemy character" see *Soefracht (V/O) v. Van Veden Schepvaart en Agentuur Maatschappij*, [1943] A. C., at p. 211; 112 L. J. K. B. 33 (Dutch company resident in Netherlands held to be alien enemy at common law after occupation of Holland by Germany in 1940).

(*n*) *Schaffenus v. Goldberg*, [1916] 1 K. B. 284; 85 L. J. K. B. 371; 113 L. T. 949.

(*o*) *Porter v. Freudenberg*, [1915] 1 K. B., at pp. 873, 880.

(*p*) *Id.*, at pp. 883, 884, 887.

The outbreak of war renders it unlawful for a British subject to engage in any intercourse, commercial or otherwise, with the enemy, except by licence of the Crown (*q*), and abrogates and puts an end to all executory contracts which for their further performance require such intercourse (*r*), though it does not avoid a contract which does not involve such intercourse (*s*). But, even where the continued existence of contractual relations is unlawful, accrued rights are not affected, though the right of suing in respect thereof is suspended (*t*); thus, though a contract of partnership between a British subject and an alien enemy is dissolved by the outbreak of war, the property of the latter is not confiscated, though his right to have it back is suspended during the war; the English partner, therefore, remains a trustee for the alien enemy partner, and at the end of the war must account to him for any profits made by the use of his property (*u*).

## SECTION 6.—Corporations and Unincorporated Associations

### SUB-SECTION 1.—Corporations.

**Contracts of corporations.**—A corporation is a legal person, with an independent legal existence, and with legal capacities, rights and liabilities distinct from those of the individuals who compose it (*w*). It may be created by royal charter or Act of Parliament or may exist at Common Law, or by prescription, a lost charter being presumed in the last case (*y*). It may be either a corporation *sole*, *i.e.*, composed of one person holding a particular office (*e.g.*, a bishop or the Public Trustee), or a corporation *aggregate*, *i.e.*, composed of many persons (*e.g.*, a municipal corporation or a company incorporated by Act of Parliament). Its chief characteristics are (i) a corporate name,

(*q*) *Halsey v. Lowenfeld*, [1916] 2 K. B., at p. 716; 85 L. J. K. B. 1498. Trading with the enemy is prohibited by the Trading with the Enemy Act, 1939.

(*r*) *Zinc Corporation, Ltd. v. Hirsch*, [1916] 1 K. B. 541; 85 L. J. K. B. 565; *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A. C. 260; 87 L. J. K. B. 581. See also *Doisneau v. Weil*, [1950] W. N. 171; [1950] 1 All E. R. 728, H. L.

(*s*) *Halsey v. Lowenfeld*, [1916] 2 K. B. 707; 115 L. T. 617; 82 T. L. R. 709 (covenants by a lessee who became an alien enemy held not to be extinguished or suspended); *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519; 86 L. J. Ch. 353; 116 L. T. 116 (policy of insurance held not to be void merely because the insured became an alien enemy); *Tingley v. Müller*, [1917] 2 Ch. 144; 86 L. J. Ch. 265; 16 L. T. 482; 83 T. L. R. 869 (an irrevocable power of attorney is not avoided by the donor subsequently becoming a public enemy).

(*t*) [1918] A. C., at p. 269.

(*u*) *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Carbonnagen Industrie*, [1918] A. C. 339; 87 L. J. K. B. 416.

(*v*) *Re Sheffield, etc., Societe*, 22 Q. B. D., at p. 476; 58 L. J. Q. B. 265; *Salomon v. Salomon & Co.*, [1897] A. C., at p. 51; 66 L. J. Ch. 85.

(*y*) *River Tone Conservators v. Ash*, 10 B. & C., at p. 383.

by which it can sue and be sued and hold property; (ii) a common seal, indicating its unity and authenticating its acts; (iii) a continuous existence by reason of the perpetual succession of its members.

The general rule is that a corporation has, as an incident attached by law, the same capacity to contract as a natural person (a), but a corporation which is created by Act of Parliament has only such powers as are expressly conferred by the Act or derived by necessary implication from its provisions (b).

The most numerous statutory corporations are those governed by the *Companies Act*, 1948, which consolidates, with some modifications, the Companies Acts, 1908 to 1947. Under this Act, following a principle introduced by the Companies Act, 1862, all that is required for the formation of a company is seven signatures to a document called a *memorandum of association*; this document is delivered to the Registrar of Companies, who registers it and gives a certificate of incorporation, which is conclusive evidence that the company is duly registered under the Act (c).

A company may be unlimited, or may be limited by shares or by guarantee. Any association consisting of seven or more persons (or, in the case of a private company, any two or more persons) *may* be registered under the Act. Any association or partnership formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership, or by the individual members thereof, and consists of more than twenty persons (or, if formed for the purpose of carrying on banking, more than ten persons) *must* be registered under the Act, unless it is formed in pursuance of some other Act, or of letters patent, or is a company engaged in working mines within the stannaries (d). An association which ought to be, but is not, registered is an illegal association (e), and all contracts made for the purpose of carrying on its business are therefore illegal (f).

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(a) See *British South Africa Company v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch., at pp. 374-376.

(b) *Wenlock (Baroness) v. River Dee Co.*, 10 A. C., at p. 362; 54 L. J. Q. B. 577; see also *Ashbury Railway, etc., Co. v. Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 185.

(c) Companies Act, 1948, ss. 1-5, 12-16. See *Salomon v. Salomon & Co.*, [1897] A. C., at pp. 51, 52; 66 L. J. Ch. 28.

(d) Companies Act, 1948, ss. 429, 434.

(e) See *Smith v. Anderson*, 15 Ch. D. 247; 50 L. J. Ch. 39.

(f) *Jennings v. Hammond*, 9 Q. B. D. 225; 51 L. J. Q. B. 493; *Shaw v. Benson*, 11 Q. B. D. 563; 52 L. J. Q. B. 575. See also *Smith v. Anderson*, 15 Ch. D. 247; 50 L. J. Ch. 39. But the Court may nevertheless protect the

The company when incorporated becomes a new legal entity, entirely distinct from its members (g). The direct remedy of its creditors is, therefore, solely against the company and not its members, and it is only to the assets of the company that the creditor can look (h). But if a company is wound up, its members may be liable to contribute to its assets for the purpose of payment of its debt. If the company is unlimited, the liability of its members is unlimited; if it is limited by guarantee, their liability is limited by their guarantee; if it is limited by shares, their liability is limited to the amount unpaid on their shares.

The memorandum of association *must* state the *objects* of the company, which is incorporated only for the purposes and objects contained in the memorandum. Accordingly, any contract made for purposes or objects foreign to or inconsistent with the memorandum, is *ultra vires* the company and void *ab initio*, and incapable of ratification (i).

The memorandum of association must be carefully distinguished from the *articles* of association; the latter are merely the internal regulations of the company, and, provided that they keep within the memorandum, the shareholders may make such regulations as they think fit; the company may, moreover, ratify a transaction which is merely *ultra vires* the articles.

A company having a share capital may not commence business until it has complied with certain requirements of the Act of 1918, and any contract made by the company before the date on which it is entitled to commence business is provisional only, and not binding upon the company until that date, but on that date it becomes binding without any confirmation (k).

A corporation aggregate, being an artificial person, can act only by an agent, and its seal is the only authentic evidence of what it has done or agreed to do, so that as a general rule it can be bound only by contracts made under its seal. To this rule, however, there are the following exceptions:—

contributors to such an association by ordering an account to be taken of any money received from them by, and still in the hands of, the agents or officials of the association: *Greenberg v. Cooperstein*, [1926] Ch. 657; 95 L. J. Ch. 466.

(g) *Salomon v. Salomon & Co.* (*supra*).

(h) *Oakes v. Turquand*, L. R. 2 H. L., at p. 357; 36 L. J. Ch. 949; 16 L. T. 808.

(i) See *Ishbury Railway, etc., Co. v. Rich*, L. R. 7 H. L. 671; 41 L. J. Ex. 185; 33 L. T. 451; *Att.-Gen. v. Great Eastern Ry.*, 5 A. C. 473; 49 L. J. Ch. 515; 42 L. T. 810; *London County Council v. Att.-Gen.*, [1901] A. C. 26; 70 L. J. K. B. 77; 83 L. T. 605.

(k) Companies Act, 1918, s. 109. This does not apply to private companies: *ibid.*

1. A corporation created for trading purposes may make without seal any contract entered into for the purpose for which it was incorporated (l).
2. Any corporation, whether incorporated for trading purposes or otherwise, may do so in matters of trifling importance or frequent occurrence or matters of urgent necessity (m).
3. "Where work is done or services rendered at the request of the corporation in respect of matters for the doing of which it was created and the whole consideration for payment is executed and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of a private person, a similar implication should be made in the case of a corporation" (n).
4. Conversely, when such an agreement, though not under seal, has been executed by the corporation, it may sue thereon (o).
5. By s. 82 of the *Companies Act*, 1948, which replaces s. 29 of the Act of 1929, the contract of a company to which the Act applies need only be under the seal of the company when the same would, if made by a private person, require a seal. Where, if made by a private person, the contract would require writing signed by the party to be charged, it may be made on behalf of the company in writing signed by some person authorised by the company. Where no writing would be necessary if the contract were made by a private person it may be made orally by some person authorised by the company. Any contract may be varied or discharged in the same manner as it was made (p).

#### SUB-SECTION 2.—Unincorporated associations

In the case of an unincorporated association, such as an unincorporated members' club, the person liable upon a contract

(l) *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 163; 4 C. P. 617; 38 L. J. C. P. 338.

(m) *Wells v. Mayor of Kingston-upon-Hull*, L. R. 10 C. P. 402; 14 L. J. C. P. 257.

(n) *Lawford v. Dillericay Rural Council*, [1908] 1 K. B. 772; 72 L. J. K. B. 551; following *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620. See also *Douglass v. Rhyl Urban Council*, [1913] 2 Ch. 407.

(o) *Doe d. Pennington v. Taniere*, 12 Q. B., at p. 1018; 21 L. J. Q. B. 361; *Fishmongers' Co. v. Robertson*, 5 Man. & G., at p. 192; 12 L. J. C. P. 185; 63 R. R. 242.

(p) See also the Companies Clauses (Consolidation) Act, 1845, s. 97. The same rules govern contracts by registered industrial and provident societies: 56 & 57 Vict. c. 39, s. 35.



made upon its behalf is the person who actually made or authorised the contract, and he can escape liability only by showing that the other party expressly or impliedly undertook to look for payment to the funds of the association only (q).

The person making the contract is *prima facie* liable, but he can escape liability by showing that he gave the order on behalf of someone from whom he had authority (r). If he had authority from a committee of the club or association, the committee is liable unless it had express authority from the members of the club, or such authority can be implied from the fact that the contract was within the purposes for which the committee was appointed (s). But an individual member of a committee of a club is not personally liable unless he has pledged his credit or given authority to someone to do so (t). Accordingly, where some members only of a committee enter into a contract, the remaining members are not liable unless the jury find that they gave authority to the other members to bind them, or that the committee as a whole agreed to be bound by the acts of its individual members (u).

#### SECTION 7.—*Professional and Occupational Incapacities*

**Barristers.**—A barrister has no legal right to remuneration for any services rendered by him as such (a). Even if the client has paid the fee to the solicitor, the barrister cannot recover it from the solicitor (b), nor can it be attached under a garnishee order obtained by his creditor (c). Conversely, a barrister is not liable for failing to render services for which he is retained (d) or for negligence (e).

(q) *Steele v. Gourlay and Davis*, 3 T. L. R. 772; and see *Coutts v. Irish Exhibition*, 7 T. L. R. 313, and *Overton v. Hewett*, 3 T. L. R. 246.

(r) *Todd v. Emly*, 10 L. J. Ex., at p. 162; 7 M. & W. 427.

(s) *Ibid.*

(t) *Overton v. Hewett*, 3 T. L. R. 246; *Draper v. Earl Manvers*, 9 T. L. R. 752.

(u) *Todd v. Emly*, 10 L. J. Ex. 262; 8 M. & W. 505. In the case of a club, no member as such is liable to pay to the funds of the society or to anyone else any money beyond the subscription required by the rules of the club; he cannot therefore be personally liable to indemnify the trustees of the club to any amount beyond that subscription: *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; 72 L. J. P. 31.

(a) *Kennedy v. Brown*, 13 C. B. (N.S.), at p. 727; 32 L. J. C. P. 187; *Brown v. Kennedy*, 33 L. J. Ch. 312.

(b) *Re Le Brasseur and Oakley*, [1896] 2 Ch., at pp. 498, 491; 65 L. J. Ch. 763.

(c) *Wells v. Wells*, [1914] P. 157; 83 L. J. P. 81 (reviewing the authorities).

(d) *Turner v. Phillips*, Peake 122.

(e) *Fell v. Brown*, Peake 96; 3 R. R. 663, and see *Swinfen v. Lord Chelmsford*, 29 L. J. Ex. 382; 2 L. T. 106.

But this rule applies only to cases in which the relation of counsel and client exists, not to contracts not involving that relationship (*f*).

**Solicitors.**—The rights of a solicitor are governed by the *Solicitors Acts* 1932 to 1941.

By s. 43 of the Act of 1932 no person is qualified to act as a solicitor unless his name is on the roll and he has in force a duly stamped practising certificate.

By s. 50 of the same Act no costs in respect of anything done by any person who acts as a solicitor at a time when he has not in force a practising certificate are recoverable in any action, suit or matter by any person whomsoever.

Apart from special agreement the remuneration of solicitors for professional work done for a client is governed (i) in contentious business, by Rules of Court. (ii) in non-contentious business, by Orders made under s. 56 of the Act.

In consequence of the fiduciary relationship between a solicitor and his client, it was formerly difficult for a solicitor to enforce against his client any special agreement giving him a greater benefit than his ordinary remuneration; if, however, a special agreement was favourable to the client there was no difficulty in enforcing it (*g*). This difficulty was removed by statutes of 1870 and 1881, re-enacted with some modifications by the Act of 1932, and a solicitor now has a statutory right of making a special *written* agreement binding upon his client. In cases decided upon the earlier statutes it has, however, been held that these statutes merely removed the disabilities of the solicitor and did not affect the Common Law rights of the client, who might therefore still set up against the solicitor an agreement which is not in writing (*h*).

By s. 57 it is provided that, whether or not any order under s. 56 is in force, a solicitor may make a special agreement with his client providing for his remuneration for *non-contentious business* by a gross sum, or by commission or percentage, or by salary or otherwise. The agreement must be *in writing and signed by the person to be bound or his agent in that behalf*. It may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor. But if, on any taxation of costs,

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(*f*) *Kennedy v. Broun*, 13 C. B. (N.S.), at p. 729.

(*g*) *Clare v. Joseph*, [1907] 2 K. B. 369; 76 L. J. K. B. 721; *Gundry v. Sainsbury*, [1910] 1 K. B. 645; 79 L. J. K. B. 713.

(*h*) *Clare v. Joseph* (*ubi supra*); *Gundry v. Sainsbury* (*ubi supra*).

it is objected to by the client as unfair or unreasonable, the taxing officer may inquire into the facts and certify them to the Court, which may cancel the agreement or reduce the amount payable and may give such consequential directions as it may think fit.

By ss. 59-62 provisions are made with regard to special agreements as to remuneration for *contentious* business. Such an agreement must be *in writing* (i); it may relate to business done or to be done; it may provide for payment by a gross sum or by commission, percentage, salary, or otherwise, and either at a greater or less rate than he would otherwise be entitled to. If, however, the business is done, or to be done, in any action, the amount payable under the agreement is not to be received by the solicitor until the agreement has been examined and allowed by a taxing officer of the Court who, if he considers that it is not fair and reasonable, may require the opinion of the Court to be taken thereon, in which case the Court may reduce the amount payable or may cancel the agreement and order the costs to be taxed. No action can be brought upon any such agreement, but every question affecting its validity or effect may be decided, and the agreement may be enforced or set aside, by the Court on the application of any party to the agreement, or any person liable to pay, or entitled to be paid, the costs in respect of which the agreement is made. Any provision in such an agreement exempting a solicitor from liability for negligence or from any responsibility to which he would otherwise be subject as a solicitor is void. Except as provided by the foregoing provisions of the Act, a bill under such an agreement is not subject to taxation, nor to the subsequent provisions with respect to the signing and delivery of a bill.

By the *Solicitors Act*, 1934, bodies corporate are prohibited from purporting to act as solicitors.

By s. 65 of the Act of 1932 it is provided that, subject to the foregoing provisions, no solicitor may bring an action for any costs due to him until one month after he has delivered a properly signed bill thereof; if, however, he can satisfy the Court that there is probable cause for believing that the party chargeable is about to quit England, or to become a bankrupt, or compound with his creditors, or to do any other act which in the opinion of the Court would tend to defeat or delay payment,

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(i) Compare the language of s. 37, *ante*. The Act retains the language of the *Attorneys and Solicitors Act*, 1870, under which it was held that a document signed by the client alone may be a sufficient agreement: *Re Jones*, [1896] 1 Ch. 222; 65 L. J. Ch. 191.

the Court may allow him to commence his action before the month has expired and may order the costs to be taxed.

The bill must be signed by the solicitor (or in the case of a firm, by any of the partners, either in his own name or the firm name), or must be enclosed in or accompanied by a letter so signed, and referring to the bill: it must be delivered to the party to be charged, either personally or by being sent to him by post to, or left for him at, his place of business, dwelling-house, or last known place of abode: where a bill has been delivered in accordance with these requirements it is not necessary in the first instance for the solicitor to prove its contents and it will be presumed, until the contrary is shown, to be a bill *bona fide* complying with the Act (k).

**Medical practitioners.**—Qualified medical practitioners were, from an early date, of three classes—physicians, surgeons, and apothecaries—who were governed by various different charters and statutes (l).

But the *Medical Act*, 1858, established a General Council of Medical Education and Registration and imposed upon it the duty of keeping a register of persons legally qualified to practise medicine. By s. 34 of the Act the words “legally qualified medical practitioner”, or “duly qualified medical practitioner”, or any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under the Act.

By s. 32 of the Act no person is entitled to recover in any Court of law any charge for any medical or surgical advice, or attendance, or for the performance of any operation, or for any medicine which he has both prescribed and supplied, unless he proves upon the trial that he is registered under the Act (m).

(k) Under earlier Acts it was held that similar provisions only made the delivery of a signed bill a condition precedent to the maintenance of an action, and did not prevent a solicitor from setting off his costs in an action brought against him by his client (*Brown v. Tibbits*, 11 C. B. (N.S.) 853; 31 L. J. C. P. 206) or from suing on a promissory note given in respect of fees (*Jeffreys v. Evans*, 14 M. & W. 210).

(l) See the *Encyclopædia of the Laws of England*, tit. Medical Practitioner. Apothecaries originally only made up medicines prescribed by physicians, but by the eighteenth century they had acquired the right to attend patients and give medical advice and prescribe medicines: see *Apothecaries Co. v. Greenough*, 1 Q. B. 800; 11 L. J. Q. B. 156; 55 R. R. 120.

(m) In order to recover he must have been registered at the time of rendering his services: *Leman v. Houseley*, L. R. 10 Q. B. 66; 14 L. J. Q. B. 22. This section does not prevent an “osteopath” from recovering fees for manual treatment or massage, as distinct from diagnosis or advice: *Macnaghten v. Douglas*, [1927] 1 K. B. 292; 96 L. J. K. B. 738.

Before the Act of 1858 the services of a physician, but not of a surgeon or apothecary, were presumed to be honorary, but this presumption might be rebutted by proof of an express contract to pay for his services (n). Now, however, under s. 6 of the *Medical Act*, 1880, every registered medical practitioner can recover by action his expenses, charges, and fees, unless he is prohibited by the bye-laws of any college of physicians of which he is a fellow (o).

**Dentists.**—By s. 1 of the *Dentists Act*, 1921, it is provided that no one, unless registered under the *Dentists Act*, 1878, shall practise or hold himself out, whether directly or by implication, as practising or as being prepared to practise dentistry, and that any person so doing shall, in respect of each offence, be liable on summary conviction to a fine not exceeding £100. The Act does not, however, apply (i) to the practice of dentistry by a registered medical practitioner; or (ii) to extractions of teeth without anæsthetic by a registered pharmaceutical chemist, or chemist and druggist, where no registered medical practitioner or dentist is available; or (iii) to the performance in any public service of minor dental work under the supervision of a registered dentist and subject to conditions prescribed by the Act.

By s. 14 of the Act it is provided that, for the purposes thereof, the practice of dentistry shall be deemed to include the performance of any such operation, and the giving of any such treatment, advice or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of the Act (p).

**Veterinary surgeons.**—With regard also to veterinary surgeons, it is provided by s. 17 of the *Veterinary Surgeons Act*, 1881 (q), that any unregistered person who takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or any branch thereof,

(n) Bullen & Leake (3rd ed.), p. 225.

(o) The Royal College of Physicians has a bye-law that no fellow of the college may sue.

(p) In this Act there is no express provision precluding unregistered persons from recovering fees or charges; as to this, however, see *post* p. 161.

(q) See also the *Veterinary Surgeons Act* (1881) Amendment Act, 1920.

shall be liable to a fine of £20 and shall not be entitled to recover any fee or charge for performing any veterinary attendance or advice or for acting in any manner as a veterinary surgeon or veterinary practitioner or for practising veterinary surgery or any branch thereof.

The chief authorities on this section are reviewed in the case of *Royal College of Veterinary Surgeons v. Kennard* (r) in which it was held that it was no infringement of the Act for a person to exhibit a notice that he had a "canine surgery", this being merely a description of a place and not of his personal qualifications to act as a canine surgeon.

**Moneylenders.**—By s. 1 of the *Moneylenders Act*, 1927, every moneylender, whether carrying on business alone or as a partner in a firm, must take out annually in respect of every address at which he carries on his business as such, an *excise licence*, which can be granted only to a person who holds a *certificate* granted under the Act.

The *excise licence* must be taken out in the moneylender's true name and will be void if taken out in any other name, but it must also show his *authorised* name and address, *i.e.*, the name under which and the address at which he is authorised by his certificate to carry on business as a moneylender.

Any person who

- (a) takes out the excise licence in any name other than his true name; or
- (b) carries on business as a moneylender without a proper excise licence or in any name or at any place other than his authorised name or address; or
- (c) in the course of his business as a moneylender enters into any agreement with respect to the advance or repayment of money or takes any security for money otherwise than in his authorised name,

is guilty of a contravention of the provisions of the Act and is for each offence liable to an excise penalty of £100 and, on a second or subsequent conviction, to three months' imprisonment (s).

A contract made in contravention of those provisions is not illegal but merely unenforceable by action. Hence the borrower is entitled to an order for the delivery up of any security given

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(r) [1914] 1 K. B. 92; 88 L. J. K. B. 267.

(s) S. 1 (2).

by him without paying to the lender any sum payable under the contract (t).

By s. 2 of the Act the *certificate* required for the grant of the excise licence is granted by the petty sessional Court having jurisdiction in the petty sessional division in which the money-lender's business is to be carried on; but within any part of the metropolitan police district for which a police court is established it can be granted only by a police magistrate. It cannot be refused except on certain specified grounds, and from a refusal to grant it an appeal lies to a Court of quarter sessions. The certificate must be in conformity with the regulations prescribed by the section and any excise licence granted in contravention of those regulations is void. A separate certificate is required for each excise licence.

By s. 5 it is provided

- (i) that no moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money from a moneylender, and that no person shall act as such (u) agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money;
- (ii) that where any document issued or published by or on behalf of a moneylender purports to indicate the terms of interest upon which he is willing to make

(t) *Cohen v. Lester, Ltd.*, [1939] 1 K. B. 504; 108 L. J. K. B. 276. Under the repealed provisions of s. 2 of the Moneylenders Act, 1900, a moneylender was required to register his name and address and to carry on business only in his registered name and at his registered address, and for any failure to comply with the requirements of the section was liable, on summary conviction, to a fine of £100. It was held that non-compliance with the section rendered *void* any contract (*Victorian Syndicate v. Doll*, [1905] 2 Ch. 624; 74 L. J. Ch. 678; *Bonnard v. Doll*, [1906] 1 Ch. 710; 75 L. J. Ch. 416; *Conclus v. Phillips*, [1918] A. C. 199; 87 L. J. K. B. 216), and that a borrower had a legal right to a declaratory judgment that a mortgage given to an unregistered moneylender was void, without being put on any terms as to repayment of the money advanced (*Chapman v. Michaelson*, [1909] 1 Ch. 238; 78 L. J. Ch. 272); but that, if the borrower also asked for equitable relief, as, *e.g.*, for the recovery of any security deposited by him, he was entitled to succeed only upon the equitable terms of making repayment of the money actually received by him (*Lodge v. National Investment Co.*, [1907] 1 Ch. 300; 76 L. J. Ch. 187).

(u) The word "such" means "of the character before mentioned", *i.e.*, employed by a moneylender or some person on his behalf for the purposes specified. The section does not, therefore, apply where a canvasser acts without any employment by or on behalf of the moneylender and does not demand or receive any sum, *etc.*, or introduce, *etc.*, a borrower; *Verner Jeffreys v. Paine* [1929] 1 Ch. 401; 98 L. T. Ch. 337.

loans or any particular loan, the document shall either express the interest proposed to be charged in terms of a rate per cent. per annum or show the rate per cent. per annum represented by the interest proposed to be charged as calculated in accordance with the provisions of the First Schedule to the Act.

Any contravention of any provision of this section is a misdemeanour, and any money-lending transaction brought about by any such contravention is *illegal*, although the moneylender was duly licensed under the Act, unless he can prove that it occurred without his consent or connivance.

By s. 6 of the Act it is provided that any contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of the Act (January 1, 1928) or for the payment by him of interest on money so lent and any security given by the borrower or by any such agent in respect of any contract is *unenforceable*, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or the security given.

The note or memorandum must contain all the terms of the contract, and in particular must show the date on which the loan was made, the amount of the principal of the loan, and, either the interest expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to the Act.

The following decisions upon this section are of importance:—

The note or memorandum must contain *all* the terms of the contract between the moneylender and the borrower, *e.g.*, an agreement that a balance of a previous loan is to be repaid out of a new loan (*Egan v. Langham Investments, Ltd.*, [1938] 2 K. B. 667; 107 L. J. K. B. 337).

The note or memorandum must exist even though the borrower does not appear to the writ or does not further defend the action. It is a memorandum of a contract within s. 1 of the Stamp Act, 1891, and must be stamped with a 6d. stamp (*Parkfield Trust, Ltd. v. Dent*, [1931] 2 K. B. 579; 101 L. J. K. B. 6).

The section applies although the contract sued on is an agreement substituted for the original contract, *e.g.*, an agreement contained in a promissory note given by the lender in respect of an amount unpaid under an agreement which was valid under the



Act (*Eldridge and Morris v. Taylor*, [1931] 2 K. B. 416; 100 L. J. K. B. 689).

The Court may go behind the memorandum and, if it is not a representation of the real transaction, there is no enforceable contract (*Lyle, Ltd. v. Chappell*, [1932] 1 K. B. 691; 101 L. J. K. B. 185; *Lancashire Louns, Ltd. v. Black*, [1934] 1 K. B. 380; 103 L. J. K. B. 129).

The memorandum must indicate plainly in what way the interest is calculated (*Parkfield Trust, Ltd. v. Urtis*, [1934] 1 K. B. 685; 103 L. J. K. B. 609).

The memorandum may be contained in more than one document. So where the memorandum stated that the loan was granted on the security of a promissory note, it was held that it might be proved by oral evidence that at the time of the loan there was in existence a form of promissory note ready for signature, and that, when this evidence was given, the Court could read the two documents together as a complete memorandum of the contract (*Reading Trust, Ltd. v. Sprin*, [1930] 1 K. B. 492; 99 L. J. K. B. 186). So also where the loan was granted on the security of a bill of sale and the memorandum referred to the bill of sale, giving its date and value, and also set out the causes of seizure referred to in the bill of sale and said that a copy of the bill of sale was attached to the memorandum, and the copy was in fact attached, it was held that the memorandum and the bill of sale would be read together so as to constitute a good memorandum (*Tooke v. Bennett & Co.*, [1940] 1 K. B. 150; 109 L. J. K. B. 97).

The copy delivered to the borrower must be a true copy (*Bennett & Co., Ltd. v. Smith*, 47 T. L. R. 592).

By s. 7 any contract made after the commencement of the Act for the loan of money by a moneylender is *illegal* in so far as it provides for payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract. But provision may be made that in default of payment on the due date of any principal or interest, the moneylender may, until it is paid, charge simple interest thereon at a rate not exceeding the rate payable on the principal apart from any default, and such interest will not for the purposes of the Act be reckoned as interest charged in respect of the loan.

By s. 8 a moneylender must, on reasonable demand in writing by the borrower and the tender by him of one shilling (or, if a copy of any document is required, of a reasonable sum) for expenses supply to him a signed statement containing prescribed particulars as to the state of the loan (a) and a copy of any document relating thereto or any security therefor. If without

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(a) I.e., the amount of the principal, the rate of interest, and the amount of any payments already made and of every sum due but unpaid or not yet due but outstanding.

reasonable excuse a moneylender fails to comply with such a demand within one month, he will not while his default continues be entitled to recover any principal or interest due under the contract or to charge any interest.

By s. 12 any agreement by a borrower to pay a moneylender any sum for costs, charges or expenses relating to the negotiations for or grant of a loan is *illegal* and any sum so paid is recoverable as a debt due to the borrower, or, if the loan is completed, must be set off against the amount lent, which is to be deemed to be reduced accordingly (y).

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(y) As to the limitation of time for proceedings in respect of money lent by moneylenders, see *post*, p. 200; and as to assignment of moneylenders' debts, see *post*, p. 200.

## CHAPTER IV

## UNLAWFUL AGREEMENTS

THE term "unlawful" is used in two senses: (i) of agreements which are contrary to law as being illegal and punishable, and (ii) of agreements which are contrary to law in the sense that the law will not give effect to them or lend any aid to enforce them (a). Agreements of both kinds are void, though they differ as to their effect upon collateral transactions.

An agreement may be unlawful either at Common Law or by statute. There are, therefore, four classes of agreements which are void because they are unlawful, namely:—

1. Agreements which are Illegal at Common Law;
2. Agreements which are Illegal by Statute;
3. Agreements which are Void at Common Law;
4. Agreements which are Void by Statute.

SECTION 1.—*Agreements Illegal at Common Law*

An agreement is at Common Law illegal and void if either the promise or the consideration involves the committal of an illegal act or if the purpose of the agreement is to effect an illegal transaction (b). Accordingly, any agreement involving or tending to effect a criminal offence or civil injury is illegal and void, as, for example, an agreement to compound a felony (c) or to publish an indecent book (d) or to defraud a third party (e) or an agreement to commit a fraud upon the public, as, *e.g.*, by creating a fictitious market in shares (f).

SECTION 2.—*Agreements Illegal by Statute*

The making of an agreement or its performance in a particular manner may be illegal and void because it is expressly declared

(a) *Moquel S.S. Co. v. McGregor*, [1892] A. C., at pp. 30, 46; 61 L. J. Q. B. 295. The term "illegal" is sometimes, though not quite accurately, applied to both classes of agreements, see *Warrs & Co. v. Heathcote*, [1918] 1 K. B., at p. 451; 87 L. J. K. B. 593.

(b) *Herman v. Juchner*, 15 Q. B. D. 561; 51 L. J. Q. B. 340; *Wild v. Simpson*, [1919] 2 K. B. 511, 88 L. J. K. B. 1085.

(c) *Brook v. Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50; *Whitmore v. Farley*, 45 L. T. 99.

(d) *Poplett v. Stockdale*, 2 C. & P. 198; 31 R. R. 662.

(e) *Baugh v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491; 1 Q. B. D. 679; 44 L. J. Q. B. 233; *Farmers' Mart, Ltd. v. Milne*, [1915] A. C. 106; 84 L. J. P. C. 33.

(f) *Scott v. Brown, Doering & Co.*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 798.

illegal by statute, as, *e.g.*, agreements in contravention of ss. 5, 7 and 12 of the Moneylenders Act, 1927 (g), or agreements which in contravention of the Truck Acts, 1881 to 1940, provide for the payment of wages in any manner other than in the current coin of the realm (h).

But, even though the making or performance of a contract is not expressly declared to be illegal, it is nevertheless illegal and void if it is expressly or impliedly prohibited by statute (i).

An example of express prohibition occurs in the *Sunday Observance Act*, 1677. A contract made on Sunday is not void at Common Law (k), but the Act provides that "no tradesman, artificer, workman, labourer, or other person whatsoever (l), shall do or exercise any worldly labour, business, or work of their *ordinary callings* (m) upon the Lord's Day or any part thereof (works of necessity and charity only excepted)", and that every person being of the age of fourteen years or upwards so doing shall for every such offence forfeit the sum of five shillings.

All contracts contrary to the provisions of this statute are illegal and void (n).

It will be noticed that the Sunday Observance Act both prohibits and penalises contracts within its scope. Sometimes, however, a statute imposes a penalty but does not contain any express prohibition. This often occurs in statutes which penalise the carrying on of some business or profession by persons who are not registered or licensed, or the doing of some particular act in a manner contrary to prescribed regulations (o). In the consideration of such a statute the question is whether the Legislature, by imposing a penalty, meant to *prohibit* contracts made by unqualified persons or not in compliance with the statutory

(g) *Ante*, pp. 155-159.

(h) See *Kinyon v. Darwen Cotton Manufacturing Co.*, [1936] 2 K. B. 103. See also *Bostel Brothers v. Hurlock*, [1949] 1 K. B. 74; [1948] L. J. R. 1846. Cost of work innocently done in excess of a licence granted under a regulation of the Defence (General) Regulations, 1939, held not to be recoverable.

(i) *Cope v. Rowlands*, 2 M. & W., at p. 157; 6 L. J. Ex. 63; 46 R. R. 532.

(k) *Drury v. Defontaine*, 1 Taunt. 131.

(l) These general words are limited by the particular words preceding them and include only persons within the classes specified by those words, and not, *e.g.*, the driver of a stage coach (*Sandiman v. Breach*, 7 B. & C. 96; 5 L. J. K. B. 298; 31 R. R. 169), or a farmer (*R. v. Cleworth*, 1 B. & S. 927). But, subject to exceptions, the carrying on of the business of a retail butcher on Sunday is prohibited and penalised by the Shops Act, 1950, and, subject to exceptions, the Sunday opening of all other shops by the same Act.

(m) *Scarfe v. Morgan*, 4 M. & W. 270; *Drury v. Defontaine* (*ubi supra*).

(n) *Simpson v. Nicholls*, 3 M. & W. 240; 7 L. J. Ex. 117; 49 R. R. 586.

(o) See *ante*, Chapter III, Section 7.

conditions (p). In determining this question the following rules have to be applied (q):

1. A penalty *prima facie* implies a prohibition (r).

2. This implication always arises (i) when, *whether or not the statute is for revenue purposes*, one of its objects is to protect the public or a particular class of persons, as for example by preventing improper persons from carrying on a business or by requiring that a certain kind of contract shall be accompanied by certain formalities; and (ii) when the penalty is a recurrent penalty, imposed as often as an act is done (s).

Thus, in *Victorian Syndicate v. Dott* (s), it was held that a contract by a moneylender who was not registered under the Money-lenders Act, 1900, was void on two grounds, namely, (i) because the object of the statute was the protection of the public, and (ii) because the penalty was a recurrent penalty, imposed every time the moneylender made a contract without complying with the Act.

So also in *Anderson, Ltd. v. Daniel* (t), where a vendor of a fertiliser of soil within s. 1 (1) of the Fertilisers and Feeding Stuffs Act, 1906, failed to give the invoice required by that section, he was held to be precluded from suing for the price, the statute imposing a penalty for failure to give the prescribed invoice and its object being the protection of purchasers.

Similarly in *Re Mahmoud v. Ispahani* (u), a vendor of linseed oil was held to be precluded from enforcing the contract because the purchaser had not the licence required by the Seeds, Oils and Fats Order, 1919, the object of the order being to protect the public.

3. But the implication does not arise when the penalty is imposed *merely* for revenue purposes (x), or when it is imposed once for all for failure to carry on a business in accordance with statutory obligations.

Thus, in *Smith v. Mairhood* (y), a contract by a tobacco dealer was held not to be avoided merely because his name was not painted over his premises as required by statute, the penalty being imposed once for all for carrying on business without having his name so painted, and not being imposed for each contract made.

(p) *Smith v. Mairhood*, 11 M. & W., at p. 61; 15 L. J. Ex. 149; 69 R. R. 724; *Learoyd v. Bracken*, [1891] 1 Q. B., at p. 117; 63 L. J. Q. B. 96.

(q) For a discussion of these rules, see *Re Mahmoud and Ispahani*, [1921] 2 K. B. 716; 90 L. J. K. B. 821.

(r) *Cope v. Rowlands*, 2 M. & W., at p. 157; 6 L. J. Ex. 63; 16 R. R. 532.

(s) *Victorian, etc., Syndicate v. Dott*, [1905] 2 Ch., at p. 630; 74 L. J. Ch. 673; 21 T. L. R. 712; 93 L. T. 127.

(t) [1921] 1 K. B. 138; 93 L. J. K. B. 97.

(u) *Ubi supra*.

(x) *Cope v. Rowlands* (*ubi supra*); *Learoyd v. Bracken* (*ubi supra*).

(y) *Ubi supra*.

SECTION 8.—*Agreements Void at Common Law*SUB-SECTION 1.—*Agreements contrary to public policy*

Although an agreement is not legal in the sense of being punishable, yet it is unlawful and void if it is contrary to public policy. It has many times been emphasised by the Courts that the paramount public policy is that people should fulfil their contracts. "But public policy in the narrower sense means that there are considerations of public interest which require the Courts to depart from their primary functions of enforcing contracts, and exceptionally to refuse to enforce them" (a). There are certain classes of contracts which have been held void at Common Law on this ground, but their number should not be increased except "in clear cases in which the harm to the public is substantially incontestable" (b).

The following are the chief classes of cases in which agreements have been held to be void on the ground that they are contrary to public policy:—

1. *Agreements contrary to morality.* The chief instances of agreements which are void as contrary to morality are agreements relating to future illicit cohabitation.

Any agreement for future illicit cohabitation is void, even though under seal (c). An agreement to pay a sum of money in consideration of past cohabitation is founded not upon an unlawful consideration, but upon *no* consideration; accordingly, it is not an unlawful agreement, but is not binding (d) unless made under seal (e).

A promise of marriage made by a man who, to the knowledge of the promisee, was married at the time of making the promise is void as being an inducement to immorality (f). But this principle does not apply if at the time when the promise was made a decree *nisi* for the dissolution of the marriage had been obtained against the man by his wife, because "the decree

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(a) *Fender v. St. John-Mildmay*, [1938] A. C., at p. 38; 106 L. J. K. B. 641. See also *Berisford v. Royal Insurance Co.*, [1938] A. C. 586, where a contractual undertaking by an insurance company to pay a sum of money to an assured's representative in the event of his dying by his own hand while sane after the expiration of a year from the commencement of the insurance was held to be void as contrary to public policy.

(b) [1938] A. C., at p. 11.

(c) See *Ayerst v. Jenkins*, L. R. 16 Eq., at p. 282; 42 L. J. Ch. 690.

(d) *Beaumont v. Reeve*, 8 Q. B. 183; 15 L. J. Q. B. 141.

(e) *Nye v. Moseley*, 6 B. & C. 133; 4 L. J. (o.s.) K. B. 178.

(f) *Wilson v. Carnley*, [1908] 1 K. B. 729; 77 L. J. K. B. 594. Or, as expressed by Lord Atkin in *Fender v. St. John-Mildmay*, [1938] A. C., at p. 16, because "such a promise tends to produce conduct which violates the solemn obligations of married life".

*nisi* has put an end to the common home, to the *consortium vitae*, to what are crudely called the conjugal rights" (g). It has, however, been held that an agreement between a married man and a woman who knows that he is married is void although it is induced by his representation that he can and will obtain a decree of nullity (h).

2. Agreements ousting the jurisdiction of the Court, as, for example, an agreement that parties to an arbitration shall be precluded from exercising the right given by the Arbitration Act, 1950, to require the arbitrator to state a special case for the opinion of the Court (i). But while parties cannot agree to oust the jurisdiction of the King's Courts, they can agree that no action shall be brought till the amount of liability has been settled by arbitration (k) or some other condition has been fulfilled.

So where a ticket for a sweepstake in Trinidad (the sweepstake being there lawful) was sold subject to a condition that upon any dispute arising the decision of the stewards of the Trinidad Turf Club was to be final, it was held that no action could be brought by a person claiming a prize until he had a decision of the stewards in his favour (l).

An agreement to refer a dispute to arbitration under the Arbitration Act, 1950, does not oust the jurisdiction of the Court but merely enables the Court to stay an action if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission to arbitration (m), and "the general principle upon which the Courts act is that, unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration" (n).

Where a contract contains a clause providing for the reference to arbitration of any differences arising "in respect of", or "with regard to", or "under" the contract or in any similar terms, and liability under the contract is disputed by one party on the ground that, in consequence of something arising outside the contract, there is no binding contract at

(g) [1938] A. C. , at p. 37.

(h) *Streyer v. Allison*, [1935] 2 K. B. 103; 101 L. J. K. B. 597.

(i) *Carmichael v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478; 92 L. J. K. B. 81; 127 L. T. 821; 38 T. L. R. 797.

(k) [1922] 2 K. B., at p. 480; *Scott v. Avery*, 5 H. L. C. 811; 25 L. J. Ex. 303; 101 R. R. 392.

(l) *Cipriani v. Pundett*, [1933] A. C. 33; 102 L. J. P. C. 118.

(m) 14 Geo. 6, c. 27, s. 4 (1).

(n) *Gouar v. Hales*, [1928] 1 K. B., at p. 199; 96 L. J. K. B. 1088.

all, he cannot set up the arbitration clause as a bar to an action by the other party (o). Where, however, "the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened, for example, whether the agreement has been broken by either of them, or as to the damage resulting from such breach, or whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance, or whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further", then the difference is within such an arbitration clause (p). An arbitration clause is merely machinery for settling disputes and therefore survives the acceptance of a breach of contract as a repudiation thereof (q).

8. Agreements tending to prejudice the State in its relations with foreign Powers, as, for example, intercourse with an enemy without licence from the Crown (r), or an agreement contrary to the obligations of national comity, *e.g.*, an agreement made for the purpose of performing in a foreign and friendly country an act illegal by the law of that country (s).

4. Agreements prejudicial to the public service or to good government. Thus, an agreement for the sale of a public office is void at Common Law (t). So also an assignment by a public officer of a pension is void, unless given to him exclusively for past services; if a pension is given not exclusively for past services but as a consideration for some continuing service, or the liability to some future service (u), or for the support of

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(o) *Jureidini v. National, etc., Insurance Co.*, [1915] A. C. 499; 81 L. J. K. B. 640.

(p) *Heyman v. Darwins, Ltd.*, [1912] A. C., at p. 360; 111 L. J. K. B. 241.

(q) *Woolf v. Collis Removal Service*, [1948] 1 K. B. 11; [1947] L. J. R. 1877.

(r) *Willison v. Patterson*, 7 Taunt. 1817; *Esposito v. Borden*, 7 E. & B. 763; 21 L. J. Q. B. 210; *Robson v. Premier Oil, etc., Co., Ltd.*, [1915] 2 Ch. 183; 84 L. J. Ch. 629.

(s) *Foster v. Driscoll*, [1929] 1 K. B. 470; 98 L. J. K. B. 282; an agreement made between five persons to load a ship with a cargo of whisky and convey it across the Atlantic to be sold in the United States or at some place from which it could be run into the United States.

(t) See *Hopkins v. Prescott*, 4 C. B., at p. 595; 16 L. J. C. P. 259; 72 R. R. 647. There are also certain express statutory prohibitions.

(u) *Wills v. Foster*, 8 M. & W. 149.



some dignity (*w*), it is against the policy of the law that it should be assignable. So also an agreement by which a person is hired for money or valuable consideration to use his influence to procure some benefit from the Government is void as against public policy (*x*). So also is an agreement to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity or if some other service is rendered (*y*).

5. Agreements tending to the abuse of civil process, as, for instance, agreements in the nature of maintenance and champerty.

Maintenance is committed whenever a person unjustifiably assists the prosecution or defence of an action in which he has no interest. Champerty is a form of maintenance in which a person lends his assistance to enable another to recover property in consideration of receiving as his reward a share of the property in dispute. Both are torts and will be dealt with more fully later (*z*). They are also indictable misdemeanours, but in order to render an agreement void it is not necessary that it should amount to maintenance or champerty as a criminal offence (*a*).

Similarly, any agreement tending to hinder the administration of justice is void, as, for example, an agreement whereunder a person was paid money upon his undertaking not to appear upon the public examination of a bankrupt (*b*), or whereby one of the parties agreed not to disclose information given to him by the other party with regard to the commission by that party and other persons of a series of criminal offences against newspaper proprietors (*c*) or whereunder a person who had been ordered to find bail deposited money with his surety in order to indemnify him against any loss which he might suffer (*d*), by himself and other persons.

This principle applies although the indemnity is given by a person other than the person bailed (*e*).

(*w*) *Davis v. Duke of Marlborough*, 1 Swanst. 74.

(*x*) *Montefiore v. Munday Motor Components Co.*, [1918] 2 K. B. 241; 87 L. J. K. B. 907.

(*y*) *Parkinson v. College of Ambulance, Ltd. and Harrison*, [1925] 2 K. B. 1; 93 L. J. K. B. 1066.

(*z*) *Post*, Part II, Chapter V, Section 2.

(*a*) *Rees v. De Barnard*, [1896] 2 Ch. 437; 65 L. J. Ch. 656; *cp. Reynell v. Sprye*, 1 De G. M. & G., at p. 677; 21 L. J. Ch. 633; 91 R. R. 225.

(*b*) *Kearley v. Thompson*, 24 Q. B. D. 742; 59 L. J. Q. B. 742.

(*c*) *Howard v. Odhams Press, Ltd.*, [1938] 1 K. B. 1; 106 L. J. K. B. 675.

(*d*) *Herman v. Juchner*, 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94.

(*e*) *Consolidated Exploration, etc., Co. v. Musgrave*, [1900] 1 Ch. 37; 69 L. J. Ch. 11.

But a contract of insurance which protects the assured against the civil consequences of his negligence is not against public policy merely because it indemnifies him against the civil consequences of negligence so great as to render him guilty of manslaughter (f).

An agreement to compound a felony is a Common Law misdemeanour, and is therefore void (g); an agreement to compromise a misdemeanour is not a criminal offence, but is also void (h), except in cases where the personal interest of the injured party is really alone in question and in which he has the choice between a civil and a criminal remedy, as, for example, in cases of assaults not of an aggravated character (i).

Where, however, A justly owes a debt to B and gives B a security, the security is not avoided because the debt was incurred under circumstances which rendered A liable to prosecution and in respect of which B had threatened to prosecute (k).

#### 6. Agreements affecting the freedom or security of marriage.

Any agreement which has a tendency to prevent a person from marrying *at all* is void (l). But, upon the analogy of *conditions* in restraint of trade, it would seem that a contract in *limited* restraint of marriage might be good, e.g., a contract against marriage with a particular class of persons (m), or against a second marriage (n).

On the other hand the Common Law Courts have in modern times held that any marriage brokerage agreement, i.e., any agreement to procure or negotiate a marriage for reward, is against public interest and void whether the agreement is to procure marriage with one particular person or to effect introductions to a number of persons for that purpose (o).

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(f) *Tinline v. White Cross Insurance Co.*, [1921] 3 K. B. 327; 90 L. J. K. B. 118; *James v. British General Insurance Co.*, [1927] 2 K. B. 311; 96 L. J. K. B. 729.

(g) *Ante*, p. 160.

(h) *Collins v. Blantern*, 2 Wilson 341; 95 E. R. 847; *Keir v. Leeman*, 6 Q. B. 308; 13 L. J. Q. B. 259; 9 Q. B. 371; 15 L. J. Q. B. 360; *Windhill Local Board v. Vint*, 15 Ch. D. 351; 59 L. J. Ch. 608.

(i) *Keir v. Leeman* (*ubi supra*); *Fisher & Co. v. Apollinaris Co.*, 10 Ch. 297; 14 L. J. Ch. 500; *Jones v. Vernonethshire Building Society*, [1892] 1 Ch. 173; 61 L. J. Ch. 138.

(k) *Flower v. Sadler*, 10 Q. B. D. 372 (*see ante*, p. 116). In this case it was expressly found that there was no agreement to compromise criminal proceedings.

(l) *Lowe v. Peers*, 4 Burr. 2225.

(m) *Jenner v. Turner*, 16 Ch. D. 188; 50 L. J. Ch. 161.

(n) *Allen v. Jackson*, 1 Ch. D. 399; 45 L. J. Ch. 310.

(o) *Hermann v. Charlesworth*, [1905] 2 K. B. 128; 74 L. J. K. B. 620. Until the beginning of the 18th century a marriage brokerage contract was not

Agreements for a possible separation of husband and wife in the future are void, but an agreement for a separation which is intended to take place and does take place immediately is valid (p). And where, while a husband and wife are living apart, a deed is executed by them with the intention of bringing them together again, a provision therein which contemplates a possible future separation is not void (q).

7. Agreements in restraint of a man's liberty to carry on his trade or business.

In the case of contracts in restraint of trade (r) two principles of the Common Law come into conflict, namely, freedom of trade and freedom of contract (s); that conflict, however, the law settles by refusing to enforce agreements when the right to bargain has been used so as to afford more than a *reasonable protection* to the covenantee (t).

In the time of Queen Elizabeth (u) any agreement by which an individual was restrained from exercising his trade or calling was thought to be contrary to public policy and void. Gradually, however, it was recognised that in some cases an agreement in restraint of trade was legal if it was required for the protection of some lawful interest of the covenantee.

But for such a covenant to be enforced it was required to be (i) for the protection of a lawful interest; (ii) limited in time and space; (iii) reasonable; (iv) for adequate consideration.

The rule that the restraint must be limited in time was subsequently relaxed, though it was still thought that a restraint

void at law, but Equity would give relief to a party who had entered into a bond in pursuance of such a contract.

(p) *Cartwright v. Cartwright*, 3 De G. M. & G. 989; 22 L. J. Ch. 841; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; 5 L. J. K. B. 115; 80 R. R. 290; see also *Hyman v. Hyman*, [1929] P., at pp. 45, 46.

(q) *Re Meyrick's Settlement*, [1921] 1 Ch. 311; 90 L. J. Ch. 152; 124 L. T. 531.

(r) The chief rules on this subject have been settled by the following cases, from which, except where reference is made to some other authority, the statements in the text are taken: *Nordenfelt v. Maxim-Nordenfelt Co.*, [1894] A. C. 535; 65 L. J. Ch. 908 (sale of a business); *Mason v. Provident, etc., Supply Co.*, [1913] A. C. 724; 82 L. J. K. B. 1153; *Herbert Morris, Ltd. v. Sareliby*, [1916] 1 A. C. 688; 85 L. J. Ch. 210 (contracts between employer and employee). The effect of the last two cases is expressed in a series of propositions by Astbury, J., in the case of the *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch., at p. 11; 89 L. J. Ch. 69.

(s) [1916] 1 A. C., at p. 699.

(t) [1920] 1 Ch., at p. 11.

(u) For the history of covenants in restraint of trade, see, in particular, the speech of Lord Herschell, L.C. ([1894] A. C., at p. 541), and of Lord Macnaghten ([1894] A. C., at p. 564).

unlimited in space could not be reasonable, and was, therefore, always void (x). But in the *Nordenfjelt Case* it was settled by the House of Lords that there is no difference in principle between a general and partial restraint, and that even a world-wide restraint may be reasonable and valid. There is, therefore, no longer any distinction in point of law between general and partial restraints (y), and a restraint may be valid though unlimited in space or time, though the generality of time or space must always be a most important factor in the consideration of reasonableness (z), and the limit of space may have a bearing on the limit of time (a).

The modern rule is this: "All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing else, are contrary to public policy, and are therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of the particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public" (b).

Since all restraints of trade are *prima facie* illegal, the covenantee must show the special circumstances entitling him to the protection of the restraint which he seeks to enforce (c).

If that restraint affords to him nothing more than reasonable protection against something which he is entitled to be protected against, then, as between the parties, the restraint is reasonable in reference to their respective interests, but,

(x) [1894] A. C., at p. 561.

(y) [1894] A. C., at p. 548. According to Lord Ashbourne (p. 557) and Lord Macnaghten (p. 564), there never was *in law* any distinction between general and limited restraints, but the former were invalid merely because no one thought that they could be reasonable. Lord Herschell (pp. 546-548) thought that there was a rule of the Common Law distinguishing particular from general restraints, but that it was inapplicable to modern conditions.

(z) [1894] A. C., at p. 575.

(a) See *e.g.*, *Fitch v. Deves*, [1921] 2 A. C. 158; 90 L. J. Ch. 436 (post p. 170). Where a restraint is limited in space the distance is measured "as the crow flies" unless otherwise specified by the parties: *Mouflet v. Cole* L. R. 8 Ex. 32; 42 L. J. Ex. 8.

(b) [1894] A. C., at p. 565; further explained in [1913] A. C., at pp. 738-739; 82 L. J. K. B. 1153; [1916] 1 A. C., at pp. 699, 700; 85 L. J. Ch. 210.

(c) *Morris v. Sazelby*, [1916] 1 A. C., at p. 707, 715.

notwithstanding this, the restraint may still be held to be injurious to the public and therefore void (d).

The onus of establishing that the restraint is reasonable rests upon the person who alleges that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public, and therefore void, rests in like manner upon the party alleging the latter (e).

In the case of *Morris v. Sarselby*, from which some of the foregoing statements are taken, the facts were as follows: The appellants were the principal firm in England making certain kinds of machinery and had branch offices in many towns. Their chief customers were the Admiralty, the War Office, the Government Ordnance Factory, numerous foreign and colonial Governments, and English and foreign railway companies. The respondent had been in their employment since he left school and was finally engaged by them as an engineer under an agreement containing a covenant by him that he would not for seven years after its termination be engaged in a similar business in Great Britain or Ireland. There was no evidence that he ever came into personal relations with the appellants' customers or that through any personal influence he could divert their custom to any other firm. There was a separate covenant binding him not to disclose any information that he might obtain with regard to the company's affairs and customers and providing that all instructions, drawings, etc., which might come into his possession during his employment should remain the property of his employers. There were no trade secrets which he could disclose. *Held*, that the covenant against engagement in a similar business was not reasonable and was contrary to the public interest.

With this may be compared the case of *Fitch v. Deves*. Here the appellant had been employed by the respondent, who was a solicitor, since he was fifteen years old. He was articulated at nineteen years of age, and when he was twenty-seven years of age became managing clerk under an agreement which provided that he should not at any time after its termination be engaged as a solicitor within seven miles of the town in which the respondent practised. The evidence showed that he had a close personal contact with the clients, of whom, as managing clerk, he interviewed about 50 per cent. *Held*, that the covenant did not exceed what was necessary for the protection of the covenantee and was not against public interest (f).

The validity of a contract in restraint of trade is for the Court. "Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the

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(d) [1916] 1 A. C., at p. 700.

(e) *Id.*, at pp. 700, 706.

(f) [1921] 2 A. C. 138; 91 L. J. Ch. 136. Compare *Boulton v. Lovagrove*, [1921] 1 Ch. 642; 90 L. J. Ch. 351.

nature of the business and of the employment, and, I think, also as to any practice which is usual among business men as regards the terms of the employment . . . because what is usual is to some extent a guide in the consideration of the requirements of the particular business" (g).

There must be some consideration to support a contract in restraint of trade, even though it is under seal (h). But the Court will not consider in any particular case the adequacy of the consideration; it is enough if there is "a legal consideration and of some value" (i).

Since the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed it is necessary to consider in each particular case what it is for which and what it is against which protection is required (k).

This principle is illustrated by the distinction drawn by the House of Lords in the cases of *Mason v. Provident Supply Co.*, and *Morris v. Saeelby* between restraints imposed upon the vendor of a business and restraints imposed by an employer upon an employee.

No one has an abstract right to be protected against competition *per se* in his business (l). But in the case of the sale of the goodwill of a business the vendor, in the absence of a restrictive covenant, could set up in the same kind of business in competition with the purchaser, though he could not solicit his old customers, or represent that he is carrying on the same business as that which he has sold (m). A covenant excluding this is in conformity with public policy, because it protects the property which is sold, enabling the vendor to sell at the best price a business which he has built up by his skill and labour, and which but for such restraint would be useless and at the same time securing to the purchaser all that he has paid for (n).

It is quite different, however, in the case of an employer taking a restrictive covenant from his employee or apprentice.

(g) *Per* Viscount Haldane, L.C., [1913] A. C., at p. 732.

(h) *Gravelly v. Barnard*, L. R. 18 Eq., at p. 522; 43 L. J. Ch. 659; *Collins v. Locke*, 4 A. C., at p. 686; 48 L. J. P. C. 68.

(i) *Hitchcock v. Coker*, 6 A. & E., at p. 457; 6 L. J. Ex. 266; [1894] A. C., at p. 565; [1916] 1 A. C., at p. 707. See also *Fitch v. Deves* (*supra*).

(l) [1916] 1 A. C., at p. 708.

(l) [1916] 1 A. C., at p. 700.

(m) *Trego v. Hunt*, [1896] A. C., at p. 27; 65 L. J. Ch. 1.

(n) [1913] A. C., at p. 738; [1916] 1 A. C., at p. 701. But, in an agreement for sale of a business, the subject of protection is only the business which is sold and not any other existing branch or business of the purchaser with which the covenantor has never had any connection, and a restrictive covenant cannot be wider than is necessary for the protection of the particular business sold: *British Concrete Co. v. Schelff*, [1921] 2 Ch. 563; 91 L. J. Ch. 114.

The goodwill of his business is subject to the competition of all persons, including a servant or apprentice, who choose to engage in a similar trade. Accordingly such a covenant will not be upheld if directed merely to the prevention of competition, or against the use of the personal skill and knowledge acquired by the employee in his employer's business. The only reason for upholding such a restraint is that the employer has some proprietary right in the nature of trade connection, or in the nature of trade secrets, for the protection of which such a restraint is reasonably necessary, having regard to the duties of the employee, and the extent to which he may obtain and misuse confidential information relating to his employer's business or personal knowledge of, and influence over, his employer's customers (o).

Where a covenant is severable, part may be good though part is void. But this is possible only when the several parts are independent of each other, so that the severance merely limits the sphere of operation of the contract; it is not possible where severance would alter the original meaning and effect of the agreement (p).

Thus, in the case of *Attwood v. Lamont*, a person employed in the tailoring department of a business with several departments covenanted that he would not at any time within a radius of ten miles be employed either in tailoring or in the business of any of the other departments in which he took no part. It was held that the covenant relating to tailoring could not be severed from the other covenants, because the object of the agreement was simply to prevent competition; to effect this, a restraint as to every branch of the business was necessary, and to strike out references to all but the tailoring business would alter the scope and intention of the agreement (q).

On the other hand, in the case of *Putsman v. Taylor*, the defendant was employed as manager and cutter by the plaintiff, who carried on business as a tailor at three places in Birmingham. He had covenanted that he would not, for a period of five years after the determination of his employment, (i) carry on any business similar to that of the plaintiff; (ii) enter the employment of a particular trade rival of the plaintiff; (iii) be employed by anyone carrying on a business similar to that of the plaintiff, either in Snow Hill, Birmingham (where he was actually employed), or within half a mile of either of the other places where the plaintiff carried on business. It was held that the covenant not to be so

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(o) [1916] 1 A. C., at pp. 709, 710.

(p) [1891] A. C., at p. 561; [1913] A. C., at p. 745.

(q) [1920] 3 K. B. 571; 90 L. J. K. B. 121. It was also held that, even if the other restraints were struck out, the restraint in respect of the tailoring business was too wide. It was further pointed out that some earlier decisions on severance may require reconsideration; as to this point, see also *Putsman v. Taylor*, *infra*.

employed at Snow Hill was severable and could be enforced, because the severance merely limited the extent or sphere of operation of the agreement, and did not alter its original meaning and effect, which was to protect the plaintiff against improper use by the defendant of knowledge acquired by him during his employment (r).

Since it is only some lawful interest of the covenantee that may be protected by a contract in restraint of trade, such a contract cannot be enforced against a former assistant by an unregistered medical practitioner who is practising in a manner which is made illegal by statute (s).

An agreement by a combination of employers regulating the method by which business is to be carried on by its members may be void as being an unreasonable restraint of trade.

Thus, a contract was made between eighteen mill owners by which they agreed to carry on their works, in regard to the amount of wages, the times of the engagement of workpeople, the hours of work, the suspending of work, and the general discipline and management of the works for twelve months in accordance with the resolutions of the majority of the owners. It was held that this contract was void as unduly restricting each owner's power of carrying on business according to his own discretion (t).

So also, where a combination of manufacturers was formed for the purpose of controlling prices, and the agreement made between them restricted the output of each member and provided that the members should sell only to certain firms (who were under no obligation to buy from any particular member), and only upon the terms and prices which should be fixed by the association, and provided no means by which a member of the association could terminate his membership, it was held that the restraint so imposed was unreasonable as between the parties and that the agreement was invalid at Common Law (u).

But an agreement between several firms to divide between themselves the stevedoring business of a port was held not invalid, although it imposed a restraint upon the members of the association, such restraint being in the particular case partial and reasonable (x).

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(r) [1927] 1 K. B. 637; 96 L. J. K. B. 315. On appeal to the Court of Appeal, it was held, without discussing the question of severability, that, in the circumstances, the agreement as a whole did not give an unreasonable protection to the plaintiff: [1927] 1 K. B. 741; 96 L. J. K. B. 726.

(s) *Davies v. Makina*, 29 Ch. D. 596; 54 L. J. Ch. 1148.

(t) *Hilton v. Eckersley*, 6 E. & B. 17.

(u) *Evans & Co. v. Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 593.

(x) *Collins v. Locke*, 4 A. C. 674; 48 L. J. P. C. 68.



A price maintenance agreement, i.e., an agreement between manufacturers (y), or between a manufacturer and a wholesale or retailer dealer (z), made for the purpose of preventing goods from being sold at less than certain fixed prices, is not necessarily injurious to the public; on the other hand, unremunerative prices may be injurious to the public; as their effect may be to drive manufacturers out of business or to lower wages and so to cause unemployment (a).

Such an agreement might, however, be injurious to the public if it was calculated to produce a pernicious monopoly by raising to an unreasonable extent the price of some commodity which the public were practically compelled to buy (b).

But the burden of establishing that a contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and if the Court is satisfied that the restraint is reasonable between the parties, the burden will be no light one (c).

And, in considering what is reasonable between the parties the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition with more favour than they will regard contracts between master and servant in unequal positions of bargaining, and will as a rule regard the parties as the best judges of what is reasonable between themselves (d).

Thus, in the case of *Palmolive Co. v. Freedman* (e), there was an agreement by which the defendant, in consideration of being allowed to buy Palmolive soap from the plaintiff company at wholesale prices and subject to wholesale trade discount, agreed not to sell that soap, "howsoever acquired", at less than 6d. a tablet. It was held that the contract was not contrary to the public interest and that it was not unreasonable between the parties, since it did not, as was the case in *Erans v. Heathcote* (f), cover the whole trade of the defendant, or create a general restraint, but only a restraint in respect of a series of proprietary articles which the defendant need not buy; moreover, since the parties were on equal terms there was no reason why they themselves should not decide the conditions of the contract.

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(y) *North-West Salt Co., Ltd. v. Electrolyte Alkali Co., Ltd.*, [1914] A. C. 461; 83 L. J. K. B. 530; 110 L. T. 852; 30 T. L. R. 313.

(z) *Palmolive Co., Ltd. v. Freedman*, [1928] Ch. 264; 97 L. J. Ch. 40.

(a) [1914] A. C., at p. 469.

(b) [1928] Ch., at p. 282; *Att.-Gen. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.*, [1913] A. C., at p. 796; 83 L. J. P. C. 84.

(c) [1913] A. C., at pp. 796; 797.

(d) [1914] A. C., at p. 471; *English Hop Growers, Ltd. v. Dering*, [1928] 2 K. B., at p. 180; 97 L. J. K. B. 569.

(e) [1928] Ch. 264; 97 L. J. Ch. 40.

(f) *Ante*, p. 173.

But all covenants against competition are justifiable only when ancillary to some main transaction, contract or arrangement, and when necessary to render it effective. Accordingly, while an arrangement between traders to submit themselves to mutual restrictions in their common interests may be valid, a bare agreement against mere competition is not valid, for the "liberty to trade is not an asset which the law will permit [a man] to barter for money except in special circumstances and within well-recognised limitations" (g). Thus an agreement by which A, who in fact never had brewed beer, covenanted with B, who brewed beer only, that he would not for fifteen years be concerned in the brewing of beer, was held to be void as being merely a sale by A of his liberty to brew beer and a purchase by B of protection against the possible competition of A in the brewing of beer (h).

Combinations of workmen for the purpose of raising wages or determining the hours of labour or otherwise interfering with the free course of trade are at Common Law governed by the same rules (i).

Combinations by Trade Unions are now governed by the *Trade Union Acts*, 1871 to 1946 (k). By the *Trade Union Act*, 1876, as amended by ss. 1 and 2 of the *Trade Union Act*, 1913, the term "trade union" means any combination whose principal objects are the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business.

By s. 3 of the *Trade Union Act*, 1871, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. But, by s. 4, nothing in the Act is to enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement between members of a trade union as such, concerning the conditions on which any members of such trade

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(g) *Vancouver, etc., Brewing Co. v. Vancouver Breweries, Ltd.*, [1931] A. C. 181, at p. 192; 103 L. J. P. C. 58.

(h) *Id.*

(i) According to some authorities combinations, whether of employers or workmen, were illegal at Common Law as conspiracies. They were, at any rate, made illegal by various statutes. An Act of 1825 (6 Geo. 4, c. 129), however, repealed all earlier statutes, and with certain exceptions left such combinations to be dealt with by the Common Law. See the judgment of Erle, J., in *Hilton v. Eckersley* (6 E. & B. 17), and of Crompton, J., in *Walaby v. Anley*, 3 E. & E. 516; 30 L. J. M. C. 121; 122 R. R. 823.

(k) The Act of 1927 has been repealed by the *Trade Disputes and Trade Unions Act*, 1946, and the law is now as it was before 1927.

union shall set their goods, transact business, employ, or be employed (l).

A contract which is not in restraint of "trade" in the literal sense may be against public policy and void if it unduly fetters a man's liberty of action and power to deal with his property. Thus, in a modern case, a contract between a moneylender and a borrower was held void which bound the latter never, without the consent of the moneylender, to change his residence, or his employment, or to part with any part of his property, or to borrow any money or obtain credit, or incur any liability (m).

And a contract which is not *ab initio* void as being contrary to public policy may become void by supervening circumstances. Thus a contract by a debtor to pay a sum of money by yearly instalments was held to have become void because through a diminution of his salary the payment of such instalments would deprive him of his sole means of support (n).

#### SUB-SECTION 2.—*Agreements tainted by illegality or immorality*

A contract which is in itself legal, e.g., a contract for the sale of goods, may be void if it is made for the furtherance of or in pursuance of an illegal or immoral transaction. Accordingly "any person who contributes to the performance of an illegal or immoral act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing supplied" (o).

Thus, in *Pearce v. Brooks* (p), it was held that coach-builders who supplied a brougham to a woman, knowing that she was a prostitute and that it was to be used by her for the purposes of her trade, could not recover the price.

So also money lent for an illegal purpose cannot be recovered (q).

(l) See *Brans & Co. v. Heathcote* (*ubi supra*). But since such an agreement is neither void nor voidable, but only unenforceable by action, a debt created under it can be a good consideration for a promise to pay implied from a subsequent account stated: *id.*

(m) *Horwood v. Miller's Trading Co.*, [1917] 1 K. B. 305; 86 L. J. K. B. 190.

(n) *King v. Faraday and Partners, Ltd.*, [1939] 2 K. B. 753; 108 L. J. K. B. 589. It was also held that it was an implied condition of the contract that the debtor should continue to have a salary big enough both to provide such instalments and to live on.

(o) *Pearce v. Brooks*, L. R. 1 Ex. 213, at p. 217; 85 L. J. Ex. 134. See also *Re Mahmoud and Isphani*, [1921] 2 K. B., at p. 725; 90 L. J. K. B. 821.

(p) *Ubi supra*.

(q) *Canman v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 M. & W. 424. 7 L. J. 110. 10 R. B. 673.

So also the lessor of premises cannot recover the rent when he knows that the lessee is the mistress of a man by whom he assumes that the rent will be paid (r).

The same rule has been applied in a case (s) where, though the premises were not let for an unlawful purpose, they were let under an agreement drawn up for the purpose of deceiving an assessment committee as to the true rateable value of the premises (s).

Similarly an agent has no rights against his principal where he is employed to carry out an illegal transaction (t).

And any subsequent contract made for the purpose of carrying into effect an illegal agreement is also void. Thus a security under seal for the payment of money due under an unlawful agreement is void (u).

It may be shown by extraneous evidence that a contract which on the face of it is perfectly legal is void because made with intent to violate the law. Where a contract is to do a thing which cannot be performed without violation of the law it is void. But in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner it is necessary to prove that intention (w).

Thus, when premises are let for a purpose which may or may not be carried out legally, the agreement is not void merely because it is carried out illegally, for the lessor is entitled to presume that it will be carried out legally (x).

But, if a transaction is merely void, collateral agreements are not invalid at Common Law. Accordingly a contract to pay money due under a void agreement is valid if made under seal (y); and if an agent is employed to make void contracts he is entitled to be indemnified by his principal against liabilities incurred by him in the course of his employment (z). Thus, in

(r) *Upfill v. Wright*, [1911] 1 K. B. 506; 80 L. J. K. B. 254.

(s) *Alexander v. Rayson*, [1936] 1 K. B. 169; 105 L. J. K. B. 148. See also *Berg v. Sadler and Moore*, [1937] 2 K. B. 158; 106 L. J. K. B. 598.

(t) *Josephs v. Pebrer*, 3 B. & C. 639; 8 L. J. K. B. 102.

(u) *Fisher v. Bridges*, 3 E. & B. 642; 23 L. J. Q. B. 276; 97 R. R. 701. As to negotiable securities, see *post*, Part III, Chapter VI.

(w) *Waugh v. Morris*, L. R. 8 Q. B., at pp. 207, 208; 42 L. J. Q. B. 57.

(x) *Streatham Cinema, Ltd. v. John McLauchlan, Ltd.*, [1933] 2 K. B. 381; 102 L. J. K. B. 536.

(y) *Payne v. Mayor of Brecon*, 3 H. & N. 579; 27 L. J. Ex. 495; 117 R. R. 863; compare *Beaumont v. Reeve* (*ante*, p. 163). An action upon an account stated will not, however, lie if the original debt was either unlawful or void, though it will lie if the debt was merely unenforceable by action (*ante*, p. 77).

(z) *Read v. Anderson*, 10 Q. B. D. 100; 13 Q. B. D. 779; 53 L. J. Q. B. 552; 51 L. T. 55. The principle of this case still holds good, though its application to similar facts has been removed by the Gaming Act, 1892 (*post*, p. 180).

a case decided before the Gaming Act, 1892, a commission agent was employed to make bets in his own name but, after the bets had been lost, his principal revoked his authority to pay them. The agent was a member of Tattersalls, and, in order to avoid the serious consequences of being adjudged a "defaulter", paid the bets and sued his principal for the amount. It was held that, wagers being not illegal but merely void, the principal was bound to indemnify his agent against all payments made in the ordinary course of business and could not revoke his authority after he had as a matter of business, though not in law, become liable to pay the bets. Upon the same principle money lent to pay betting losses can be recovered by the lender, even though he knows the purpose for which it is borrowed (a).

#### SECTION 4.—*Agreements Void by Statute*

In some cases agreements, without being prohibited or penalised, are simply declared void by statute. The most important of this class of agreements are gaming and wagering agreements.

**Gaming and wagering contracts.**—Gaming is playing at any game, whether of chance or skill, for money or money's worth, which is staked by the players on the result of the game (b). A wager is an agreement between two parties that upon the determination of some future uncertain event or some doubtful issue one party shall win from the other a sum of money or other stake, neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose (c).

Most of the definitions found in the authorities relate only to future uncertain events, but a wager may of course be made upon any question in relation to which parties are at issue, whether it relates to future, present or past events as, e.g., a wager upon the sex of a third person (d), or whether an unmarried woman has had a child (e), or as to the result of a horse race already run (f).

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(a) *Hill v. For*, 1 H. & N. 359; *Re O'Shea, ex p. Lancaster*, [1911] 2 K. B. 981; 51 L. J. K. B. 70.

(b) *R. v. Ashton*, 1 F. & B. 286; 23 L. J. M. C. 1; 93 R. R. 188; *Dyson v. Mason*, 22 Q. B. D. 351; 58 L. J. M. C. 55; *Lockwood v. Cooper*, [1903] 2 K. B. 128; 72 L. J. K. B. 690.

(c) *Thacker v. Hardy*, 1 Q. B. D. 685; 48 L. J. Q. B. 289; *Carlul v. Carbolio Smoke Ball Co.*, [1892] 2 Q. B., at p. 490; 63 L. J. Q. B. 257; *Forget v. Ostigny*, [1895] A. C., at p. 326; 64 L. J. P. C. 62. For the expression "doubtful issue", see *Att Gen v. Luncheon and Sports Club*, [1929] A. C., at p. 405; 98 L. J. K. B. 359.

(d) *Da Costa v Jones*, 2 Comp. 729.

(e) *Ditchburn v. Goldsmith*, 1 Camp. 152.

(f) *Pugh v. Jenkins*, 1 Q. B. 681; 10 L. J. Q. B. 201.

To constitute a gaming or wagering agreement it is essential that it should contain the element of gaming or wagering *as between the parties* and that each party may under it either win or lose; if it is not an agreement by way of gaming or wagering between the parties or if either of the parties may win but cannot lose, or may lose, but cannot win, it is not a wagering contract (g).

At Common Law a gaming or wagering contract was not void unless of such a nature as to contravene public policy, as, for instance, if tending to the injury or annoyance of others, or to outrage decency (h).

By various statutes, the list of which begins at an early date and is continually being extended, certain games and certain ways of gaming and betting have been made *illegal* and punishable (i), so that, as has been already pointed out, any contract connected therewith is necessarily void. It is outside the scope of this book to discuss illegal gaming and wagering and, except where special reference is made to illegality, this section deals only with gaming and wagering contracts which are made void by statute.

By s. 18 of the Gaming Act, 1845, it was provided that *all contracts or agreements by way of gaming or wagering shall be null and void*, and that no action shall be brought to recover any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; provided always that this shall not be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

A contract based on forbearance to request Tattersall's Committee to report the loser has been held by the House of Lords to be a contract to pay what the committee had ordered the loser to pay and therefore a contract to pay money won on wagers on horse races and as such void under the Act (k).

(g) See cases cited in note (i) and *Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1; 98 L. J. Ch. 177; 140 L. T. 628; 15 T. L. R. 234.

(h) See, e.g., *Da Costa v. Jones* (*ubi supra*); *Ditchburn v. Goldsmith* (*ubi supra*).

(i) See *Hampden v. Walsh*, 1 Q. B. D., at p. 192; 15 L. J. Q. B. 228; *Jenk. v. Turpin*, 13 Q. B. D. 505; 53 L. J. M. C. 161, and Harris and Wilshire's Criminal Law, Book II, Chapter 5.

(k) *Hill v. William Hill (Park Lane), Ltd.*, [1949] A. C. 530, overruling *Hyams v. Stuart King*, [1908] 2 K. B. 696; *Bubb v. Yelverton* (1870), L. R. 9 Eq. 471; and *Goodson v. Baker* (1908), 98 L. T. 415.

By the *Gaming Act*, 1892, it was further provided that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the *Gaming Act*, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise *in respect of any such contract or of any services in relation thereto or in connection therewith*, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

The first of these Acts dealt merely with wagering contracts themselves and, since it merely made them void and not illegal, did not avoid collateral transactions. Therefore money paid in discharge of the betting debts of another person was recoverable (l), and, as between principal and agent, the agent did not lose his rights against his principal because he was employed for the purpose of betting (m). If, however, a principal employed an agent to make bets which the agent failed to make, the principal could not maintain against him an action for damages for breach of contract, because the agent was employed to enter into contracts which, if made, would have been void and the performance of which could not have been enforced (n). And if a bookmaker by mistake overpays a backer he cannot recover the amount so overpaid, because in order to ascertain whether an overpayment was made the Court would have to investigate betting accounts and to set off winnings against losses as if they were items in an account relating to legal transactions (o).

But the *Gaming Act*, 1892, also makes void collateral contracts. Thus,

an arbitration clause which is part of a contract by gaming or wagering is void (p).

A, at the request of B, pays B's betting debts. A cannot recover the amount from B, since the payments were made "in respect of" a contract void under the *Gaming Act*, 1845 (q).

A advances money to B as his partner in order to make bets on their joint account. The bets are lost and paid by B. A cannot recover half the loss from B (r).

(l) *Rosenbaum v. Billings*, 15 C. B. (N.S.) 316; 137 R. R. 528.

(m) *Read v. Anderson* (ante, p. 177).

(n) *Cohen v. Kittell*, 22 Q. B. D. 680; 50 T. J. Q. B. 241.

(o) *Morgan v. Ashcroft*, [1938] 1 K. B. 49; 106 T. J. K. B. 544.

(p) *Lac (Inc), Ltd. v. Dalmay (Lord)*, [1927] 1 Ch. 300; 96 L. J. Ch. 174.

(q) *Tatum v. Ricci*, [1893] 1 Q. B. 779; 62 L. J. Q. B. 30; 67 T. T. 683.

In this case it was said by Wills, J., that this rule applies whether or not A was employed to make the bets, and apparently whether or not A knew that the debts were for bets. This dictum was, however, dissented from by Fletcher Moulton, L.J., in *Hjams v. Stuart King*, [1908] 2 K. B., at p. 715; 77 L. J. K. B. 794.

(r) *Saffery v. Moyer*, [1901] 1 K. B. 11; 70 L. J. K. B. 145; 83 L. T. 394.

A agrees to fight B for stakes to be deposited with a stakeholder. A borrows his stake from C on the terms that it is to be repaid only if he wins. A wins and gets the stakes, but refuses to pay. C cannot recover his loan from A (s).

But if an agent is employed to make bets, which are won and received by the agent, the Act does not prevent the principal from recovering the same from the agent as money received on his behalf (t).

Nor does it prevent the recovery of money lent to pay betting losses (u).

It has not yet been decided whether since the Gaming Act, 1802, money lent in England for the purpose of making bets in England, but repayable at all events, can be recovered by the lender (a). But money lent in a country where gaming or betting is recognised by law, for the purpose of gaming or betting there, can be recovered in England (b).

By s. 3 of the *Betting Act*, 1853 (c), it is provided that it shall be illegal to keep any house, office, room, or other place for the purpose of betting with persons resorting thereto, and therefore any contract in contravention of the Act would be void because *illegal* (d).

(s) *Carney v. Plimmer*, [1897] 1 Q. B. 631; 66 L. J. Q. B. 415.

(t) *De Mattos v. Benjamin*, 63 L. J. Q. B. 248. See also *Cheshire & Co. v. Vaughan Brothers & Co.*, [1920] 3 K. B., at p. 249; 89 L. J. K. B. 1168.

(u) *Re O'Shea, ex p. Lancaster*, [1911] 2 K. B. 981; 81 L. J. K. B. 70.

(a) It is submitted, however, that it can be recovered unless it is lent under a contract between lender and borrower that it is to be applied for making bets, or is lent for gaming which is within the Gaming Act, 1710 (*Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153; 98 L. J. K. B. 305; see *post*, p. 185), or which is illegal (*Cannan v. Bryce*; *McKinnell v. Robinson*, *ante*, p. 176).

(b) *Sazby v. Fulton*, [1909] 2 K. B. 208; 78 L. J. K. B. 781; 101 L. T. 179, following *Quarrier v. Colston*, 1 Ph. 147; 65 R. R. 351; *Société, etc., du Paris Plage v. Baumgart*, [1927] W. N. 78; 96 L. J. K. B. 789; 136 L. T. 799; 43 T. L. R. 278. But a security given for such a debt is given for an illegal consideration within s. 1 of the Gaming Act, 1835; see *Moulis v. Owen*, *post*, p. 185.

(c) By the Racecourse Betting Act, 1928, it is provided that nothing in the Betting Act, 1853, shall apply to any "approved racecourse" or any act done thereon on the days on which horse races, but no other races, are run thereon. The Act also establishes a Racecourse Betting Control Board, and makes it lawful, subject to certain conditions, (i) for this Board or any person authorised by them, to set up and operate on any approved racecourse a totalisator for the purpose of effecting betting transactions on horse races only, and only on days when horse races, but no other races, take place on the racecourse; (ii) for any person to effect betting transactions by means of a totalisator lawfully operated. The use on a dog-racing track of a totalisator for betting on dog races on licensed dog racecourses is also, subject to conditions, permitted by Part I of the Betting and Lotteries Act, 1934.

(d) As to what constitutes a "place" upon a racecourse, see *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143; 68 L. J. Q. B. 392.



But the business of a bookmaker is not illegal if it is carried on in a manner which does not infringe the provisions of the statute (e), and in such a case an action can accordingly be maintained by one partner in a bookmaker's business against the other partner for an account of the profits of the partnership (f), but the plaintiff will not be entitled to claim contribution in respect of any losses paid by him (g).

*Stock Exchange transactions.*—Where a speculator employs a broker on the Stock Exchange to effect contracts for the sale or purchase of stock according to the rules of the Stock Exchange for delivery on a future day, the contract between them is not illegal or void merely because it is the intention of both parties that the speculator shall not be called upon actually to deliver or accept such stock as may be sold or purchased, but only to pay or receive, as the case may be, the difference between the price of the stock on the day of the sale and the price on the day named for delivery (h). If, however, the broker is not employed to make contracts for the sale or purchase of stocks, but the agreement between him and the speculator is that the latter shall merely pay or receive differences, this, though not illegal, is a void agreement (i), even although there is superadded to the contract a provision that, if required, the stock shall be actually delivered, or actually taken up (k).

It is for the jury to say whether a contract relating to dealings in stocks and shares is intended by the parties to be a gambling transaction between them in differences or a *bona fide* sale and purchase of shares, and the Court will not ordinarily

(c) *Jeffrey v. Bamford*, [1921] 2 K. R. 351; 90 L. J. K. B. 664. See also *Humphrey v. Wilson*, 45 T. L. R. 535. By ss. 11 and 12 of the Betting and Lotteries Act, 1934, the occupier of a licensed dog racecourse is bound to provide for bookmakers space on the track for carrying on bookmaking while a totalisator is being operated, though nothing is to prevent the operation of the Betting Act, 1853, in respect of the exclusive use by a bookmaker of any permanent structure or any position specially appropriated to his exclusive use.

(f) *Thwaites v. Coulthwaite*, [1896] 1 Ch. 196; 65 L. J. Ch. 268; *Brookman v. Mather*, 29 L. T. 276. The case of *Thomas v. Dey*, 24 T. L. R. 272, cannot be supported, see *Ken v. Price*, [1914] 2 Ch. 98; 83 L. J. Ch. 865. In the last case it was held that, on taking an account between bookmakers, the defendant might object to repaying anything representing profits. See, however, *De Mattos v. Benjamin* (*ante*, p. 181, note (i)).

(g) *Saffery v. Mayer*, *ante*, p. 180, note (i).

(h) *Thacker v. Hardy*, *Thacker v. Whately* (1879) 4 Q. B. D. 685; 48 L. J. Q. B. 269; *Ex p. Rogers, re Rogers* (1880), 15 Ch. D. 207; *Forget v. Ostigny*, [1895] A. C. 518; 64 L. J. P. C. 62.

(i) *Per Bramwell, L.J.*, in *Thacker v. Hardy* (1879), 48 L. J. Q. B., at p. 296.

(k) *Re Gucci, ex p. Trustee*, [1899] 1 Q. B. 794; 68 L. J. Q. B. 509.

interfere with the finding of the jury (l). The point to be considered is whether, as between broker and speculator, it is a wager in differences or whether the broker is employed as broker for the purpose of making, on behalf of the speculator, genuine contracts in which his gain consists only in the commission which he is to receive, even though he may know that the speculator is merely gambling and such genuine contracts are only intended by him and the speculator to be a means by which the speculator may gamble (m).

If the transaction is held to be a contract by way of gaming and wagering, it has been decided that securities deposited by the client with the stockbroker by way of "cover" can be recovered back by the client, because they are not deposited "to abide the event", but as security against a debt which may arise (n). If, however, money is deposited in a similar way, and is actually appropriated in payment of losses, it cannot be recovered back (o), though, where there are no losses or the losses have not exhausted the deposit, it is otherwise (p).

*Deposits with a stakeholder.*—Where parties to a wager deposit the amounts of their bets with a stakeholder to abide the result of the wager, either party may, at any time before the stakes are paid over to the winner, repudiate the transaction and is not then prevented either by the Gaming Act, 1845, or the Gaming Act, 1892, from maintaining an action to recover his own deposit from the stakeholder.

Thus, in *Diggle v. Higgs* (q), A and B agreed to walk a match for £200 a side and each deposited with a stakeholder the sum of £200 to be paid to the winner. A won, but before the stakes were paid to him B claimed his deposit from the stakeholder. *Held*, that the agreement was a wager, that B had paid his money under a contract that was void and was entitled to recover it.

In *O'Sullivan v. Thomas* (r), upon similar facts, it was argued that the law had been altered by the Gaming Act, 1892, and that the deposit was not recoverable because it was "money paid" by the plaintiff under or in respect of a wagering contract. *Held*,

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(l) *Universal Stock Exchange v. Strachan* (No. 1), [1896] A. C. 166; 65 L. J. Q. B. 129.

(m) See *Barnett v. Sanker*, 41 T. L. R. 660; *Weddle, Beck & Co. v. Hackett*, [1929] 1 K. B. 321; 98 L. J. K. B. 213.

(n) *Universal Stock Exchange v. Strachan* (ubi supra).

(o) *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178.

(p) *Re Cronmire, ex p. Waud*, [1898] 2 Q. B. 383; 67 L. J. Q. B. 629.

(q) 2 Ex. D. 422; 16 L. J. Ex. 721; see also *Hampden v. Walsh*, 1 Q. B. D. 189; 45 L. J. Q. B. 238.

(r) *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; 64 L. J. Q. B. 308; affirmed by *Burge v. Ashley and Smith, Ltd.*, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538.

that the expression "money paid" does not cover a sum so deposited with a stakeholder.

But in consequence of the Gaming Act, 1845, the winner of the wager cannot recover the stakes from the stakeholder or loser (s), nor can the loser maintain an action against the stakeholder for the amount of his own deposit if, without any dissent on his part, it has been paid to the winner (t).

Where two parties deposit money with a stakeholder to abide the result of a wager upon a lawful game or match between themselves, their deposits are not within the proviso to s. 18 of the Gaming Act, 1845, as subscriptions or contributions towards a sum of money to be awarded to the winner, for the proviso only applies to contracts which never did or could fall within the earlier part of the section (u).

But a contract between a club and persons who nominate horses for a sweepstake promoted by the club and agree to pay entrance fees in respect of the horses nominated, is not a contract by way of gaming or wagering, even though the prizes are in part composed of the entrance fees, because there is no bet between each nominator and the club; accordingly, if entrance fees are not paid by a nominator in pursuance of his agreement, the club can recover them by action (a). But a club sweepstake on the result of a race when the winner is ascertained by chance, i.e., the luck of the draw, is a lottery and illegal (b).

*Gaming debts and bonds and securities therefor.*—By the Gaming Act, 1710, all notes, bills, bonds, or other securities, the whole or any part of the consideration for which is for any money or other valuable thing won by gaming or playing at any game (c) or by betting on the players, or for repaying any money knowingly lent for such gaming or betting, or lent or advanced at the time and place of such play to any person gaming, playing or betting, were made void.

But by s. 1 of the Gaming Act, 1835, all such securities are deemed to have been made, drawn, accepted, given, or executed

(s) *Diggle v. Higgs* (ubi supra).

(t) *Howson v. Hancock*, 8 T. R. 575; see also *Hasleton v. Jackson*, 8 B. & C. 221; 6 L. J. K. B. 318; 22 R. R. 369.

(u) *Diggle v. Higgs* (ubi supra); *Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1; 98 L. J. Ch. 177.

(a) *Ellesmere (Earl) v. Wallace* (ubi supra).

(b) *Id.* [1929] 2 Ch., at p. 46.

(c) A horse race is a "game" (*Woolf v. Hamilton*, [1898] 2 Q. B. 337; 67 L. J. Q. B. 917); so also, apparently, is cricket (*Maskell v. Hill*, [1921] 3 K. B., at p. 163; 90 L. J. K. B. 1922).

for an *illegal* consideration. The result of this Act is that if a bill of exchange, cheque or promissory note is given by A to B for a consideration within the Act of 1710, no action can be maintained thereon by B or by anyone but a *holder in due course* (d).

If, however, a bill of exchange, cheque or promissory note is given by A to B for a consideration which is not illegal within the Acts of 1710 and 1835 but is merely *void* under the Gaming Acts, 1845 and 1892, it is simply given for no consideration, and, although in this case also no action can be maintained thereon by B, the amount thereof can be recovered by any subsequent *holder for value*, even though he had notice of its origin (e).

Where an English cheque is given in a foreign country for money lent for gaming in that country the Gaming Act, 1885, applies to the cheque even though the gaming is legal by the law of that country (f); but an action can be brought upon the consideration for the cheque (g). Where, however, the cheque is given for money lent for gaming in England within the Gaming Act, 1710, that Act also avoids the consideration for the cheque (h).

A promise to pay the amount of a lost wager is enforceable if there is a new contract for valuable consideration. Thus an action has been held to be maintainable on a cheque given by the defendant in payment of lost bets and in consideration of the withdrawal of a complaint to his club (i). But the mere giving of time for payment (k) or a promise to forbear from suing if payment is made by instalments (l) is no consideration for a fresh promise to pay (k).

### SECTION 5.—Consequences of Unlawfulness

Where an agreement is unlawful the Court must, as a general rule, refuse to enforce it, even though the objection that it is

(d) Bills of Exchange Act, 1882, ss. 29, 30.

(e) Bullen & Leake (3rd ed.), p. 589; *Fitch v. Jones*, 5 E. & B. 245; 23 L. J. Q. B. 293; 103 R. R. 455; *Lilley v. Rankin*, 56 L. J. Q. B. 248; 55 L. T. 814.

(f) *Moulis v. Owen* (post, p. 186).

(g) See cases cited, ante, p. 180, note (o).

(h) *Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153; 98 L. J. K. B. 305; 140 L. T. 534; 45 T. L. R. 195.

(i) *Re Browne, ex p. Martingell*, [1904] 2 K. B. 133; 73 L. J. Ch. 446. See now *Hill v. William Hill (Park Lane), Ltd.*, [1949] A. C. 530.

(k) *Chapman v. Franklin*, 21 T. L. R. 615; *Ladbroke & Co. v. Buckland*, 25 T. L. R. 55; *Re Comar, ex p. Ronald*, 52 S. J. 642.

(l) *Poteliakhoff v. Teakle*, [1938] 2 K. B. 816; 107 L. J. K. B. 679.

void comes from the person guilty of the unlawfulness (*m*). And if the evidence shows that the agreement is unlawful the Court must itself take the objection (*n*). Where, however, an agreement is not *ab initio* illegal and may be performed either in a lawful or an unlawful way and the defendant, without the knowledge of the plaintiff, has elected to perform it unlawfully, he cannot plead its illegality (*o*). But where for the protection of the public a statute regulates the performance of a contract and imposes a penalty for breach of its regulations, a contract performed in a mode which violates these regulations cannot be enforced by the party guilty of such illegal performance, and it is immaterial that the contract was not *ab initio* illegal and might have been performed by him in a legal manner (*p*).

The legality of a contract is determined by the law which governs it (*q*). Accordingly a contract which is valid by the law of the country where it is made may usually be enforced in this country, although it is void by English law (*r*), unless it conflicts with what are deemed in England to be essential public or moral interests (*s*), or is an agreement for the performance in England of something which would violate English law (*t*).

Thus, money lent for the purpose of gaming in a foreign country, the gaming being lawful in that country, is recoverable in England (*u*).

But a contract valid by the law of the country where it was made will not be enforced if it was procured by improper moral coercion (*s*).

Nor will a contract that is valid where it is made be enforced if it involves the performance in England of a champertous agreement (*t*).

But where the rights of the parties to a security for a debt are to be ascertained by the law of England, the security cannot be enforced in England if it is void by English law.

Thus, in *Moulis v. Owen* (*a*), the defendant gave the plaintiff in Algiers, a cheque to secure money lent by him to the defendant for

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(*m*) *Re Mahmoud and Isphani*, [1921] 2 K. B. 716, at p. 729; 90 L. J. K. B. 821.

(*n*) *Ibid.*, and see *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; 87 L. J. K. B. 907.

(*o*) *Re Mahmoud and Isphani* (*ubi supra*).

(*p*) *Anderson, Ltd. v. Daniel*, [1921] 1 K. B. 138; 93 L. J. K. B. 97 (*ante*, p. 162).

(*q*) *Ante*, p. 92.

(*r*) *Santos v. Illidge*, 5 C. B. (N.S.) 561; 29 L. J. C. P. 348; 125 R. R. 919; *Sarby v. Fulton*, [1900] 2 K. B. 208; 78 L. J. K. B. 781.

(*s*) *Kaufman v. Gerson*, [1904] 1 K. B. 591; 73 L. J. K. B. 320.

(*t*) *Griff v. Levy*, 16 C. B. (N.S.) 73; 189 R. R. 414.

(*u*) *Sarby v. Fulton* (*ubi supra*).

(*a*) [1907] 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348.

gaming, the gaming being legal in Algiers and the consideration for the cheque being valid by French law. The cheque was an English cheque, drawn on an English bank and payable in England. Held, that the rights of the parties in the cheque must be governed by English law; that the cheque must therefore be deemed to have been given for an illegal consideration within s. 1 of the Gaming Act, 1836 (*ante*, p. 184); and that the plaintiff could not recover upon it in this country.

When a contract is in itself legal, but one of the parties, without the knowledge of the other, has entered into it for the furtherance of an illegal transaction, the innocent party is not thereby prevented from recovering any money due to him under the contract.

Thus, the vendor of goods bought for immoral purposes is not disentitled to recover the price if he did not know the purpose for which they were bought (b). And a lessor of premises is not prevented from recovering the rent because, without his knowledge, the lease is taken for the purpose of carrying on an illegal enterprise (c).

If he discovers the illegal intention of the other party, he may rescind the contract while it is still executory; but if after discovering such illegal intention he executes his part of the contract, he is not entitled to enforce payment (d).

A contract may be partly good and partly bad. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (e). But to permit severance there must be a separate promise, the subject of separate consideration, the performance of which is independent of any other promises which the promisor may have made (f). If there is one entire contract, and any part of the consideration is void, the whole contract is void (g).

(b) See *Pearce v. Brooks* (*ante*, p. 176).

(c) *Stratham Cinema, Ltd. v. John McLaughlan, Ltd.*, [1933] 1 K. B. 331: see *ante*, p. 177.

(d) *Cowan v. Milbourn*, 1 L. R. 2 Ex. 230; 36 L. J. Ex. 124. Here the lessor of a hall was held to be entitled to rescind a contract to let it on discovering that it was to be used for blasphemous lectures. The case is, however, no longer an authority upon the question of what constitutes blasphemy. See *Bowman v. Secular Society*, [1917] A. C. 406; 86 L. J. Ch. 568.

(e) *Pickering v. Ilfracombe Ry.*, 1 L. R. 3 C. P., at p. 250; 37 L. J. C. P. 118.

(f) *Putsman v. Taylor*, [1927] 1 K. B., at p. 640; 96 L. J. K. B. 315.

(g) *Hopkins v. Prescott*, 4 C. B., at pp. 595, 596; 16 L. J. C. P. 259; 72 R. R. 647. See also *Shackell v. Rosier*, 2 Bing. N. C. 634; 5 L. J. C. P. 193; 42 R. R. 666.

*Money paid or property transferred under an illegal or immoral agreement.*—"The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case" (h). Accordingly, where money has been paid or property has been transferred under an illegal or immoral agreement, the person paying cannot recover if, in order to establish his claim, he has to rely on the original agreement (i).

Thus, in *Taylor v. Chester* (k), A was the keeper of a brothel and had supplied B with wine to be consumed in a debauch therein. B, being unable or unwilling to pay at once, deposited with A the half of a £50 note as security. Subsequently repenting he brought an action to recover it. A pleaded that it was delivered by way of pledge and as security for payment. B, in his replication, set up the immorality of the transaction. A demurred to the validity of the replication. *Held*, that as B could not make out a case except through the immoral transaction, judgment must be entered for A.

Again, in *Berg v. Sadler and Moore* (l) the defendant was a member of a Tobacco Trade Association and as such was not allowed to sell tobacco to the plaintiff, who had been placed on the "stop-list" of the Association for price-cutting. The plaintiff attempted to obtain cigarettes from the defendant by falsely representing that they were required by R, who was a member of the Association. The defendant, becoming suspicious, refused to deliver the cigarettes or to return the money. The plaintiff having sued for the return of his money it was held that he could not recover it because he could only establish his claim by proving circumstances which showed that he was engaged in the criminal attempt to obtain goods by false pretences.

The only exceptions to the above rule are :—

(i) Where no part of the illegal purpose has been effected (m).

Thus, in *Taylor v. Bowers* (m), the plaintiff in order to defeat his creditors assigned, for a fictitious consideration, all his stock-in-

(h) *Farmers' Mut. Ltd. v. Milne*, [1915] A. C., at p. 113; 84 L. J. P. C. 33; 111 L. T. 871.

(i) *Ibid.*, and see *Re Campbell, ex p. Wolverhampton Banking Co.*, 14 Q. B. D. 32 (money paid to stifle a prosecution); *Kearley v. Thompson*, 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150 (money paid under an illegal contract to stifle bankruptcy proceedings); *Parkinson v. College of Ambulance, Ltd.* (ante, p. 166); *Wild v. Simpson*, [1919] 2 K. B. 251; *Taylor v. Chester*, 14 Q. B. 309; 38 L. J. Q. B. 225 (immoral transaction). The extent to which this rule is applicable to contracts which are merely immoral is not clear. It has been held not to apply to money paid under a marriage brokerage contract, as not being "analogous to a contract in restraint of trade or a contract to stifle a prosecution": *Hermann v. Charlesworth*, [1905] 2 K. B., at p. 186; 74 L. J. K. B. 620.

(k) L. R. 1 Q. B. 309; 38 L. J. Q. B. 225.

(l) [1937] 2 K. B. 158; 106 L. J. K. B. 97.

(m) *Taylor v. Bowers*, 1 Q. B. D. 291; 46 L. J. Q. B. 39; *Kearley v. Thompson*, 24 Q. B. D. 742; 59 L. J. Q. B. 288.

trade to A. Without the plaintiff's knowledge A subsequently assigned the stock-in-trade to the defendant who was a party to the scheme. Nothing was done in pursuance of the illegal agreement to defraud the creditors. *Held*, that the plaintiff was entitled to repudiate the illegal transaction and recover his goods from A and that the defendant, since he knew how A had obtained the goods, had no better title.

On the other hand, in *Herman v. Jeuchner* (n), where a defendant in a criminal case, who was ordered to find bail for his good behaviour for a certain period, deposited money with his surety to secure him, under an arrangement for repayment at the end of the period, it was held that no action could be maintained by the depositor to recover it back, either before or after the period, although the defendant had not committed any default and the surety had not been called upon to make any payment. for the contract was illegal because it took away the protection which the law affords for securing the good behaviour of a defendant, and the illegal purpose was completed as soon as the surety lost any interest in taking care that the conditions of the recognisance were performed.

Again, in *Kearley v. Thompson* (o), money was paid to solicitors by the plaintiff, who was the friend of a bankrupt, upon their undertaking not to appear at his public examination and not to oppose his order of discharge. They did not appear at his public examination, and before any application for his discharge had been made the plaintiff brought an action to recover the money which he had paid. *Held*, that the agreement was illegal as interfering with the course of justice and that, as it had been partly performed, the money paid could not be recovered.

Where, however, under an illegal contract, two parties deposit money with a stakeholder to abide a certain event, the following rules apply : (a) if the event happens and the money is paid over by the stakeholder to the winner, the loser cannot recover his stake ; (b) before the event has happened, either party may reclaim his stake ; (c) even if the event has happened, the loser may reclaim his stake from the stakeholder at any time before it has been paid to the winner (p).

Where an illegal contract has been executed and property has passed thereby, the illegality of the agreement does not affect the passing of the property (q). Thus if premises are let for an unlawful purpose, the lease remains valid although the lessor cannot maintain an action upon the covenant to pay rent or any other covenant in the lease ; for, when the lease is executed

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(n) 15 Q. B. D. 561; 54 L. J. Q. B. 340.

(o) *Ubi supra*.

(p) *Hastelow v. Jackson*, 8 B. & C. 221; 6 L. J. K. B. 318; 32 R. R. 369; *Barclay v. Pearson*, [1893] 2 Ch. 154; 62 L. J. Ch. 686.

(q) *Scarfe v. Moran*, 4 M. & W.. at p. 281; 7 L. J. Ex. 324.



and possession is given under it, no aid of a Court of justice is required to enforce it (r).

(ii) Where the parties are not *in pari delicto* and where public policy is considered as advanced by allowing the more excusable party to obtain relief (s).

Thus, parties are not *in pari delicto* where an illegal contract of insurance is entered into, the assured being ignorant of the law and being induced to enter into the contract by a fraudulent misrepresentation of law made by the agent of the assurance company (t).

Where, however, in a similar case, the misrepresentation of law was made innocently by the agent, it was held that, since there was a common mistake of law, the parties were *in pari delicto* and that the assured could not therefore recover premiums paid by him (u).

(iii) Where the contract is made illegal by a statute intended to protect a certain class of persons, and the person seeking to recover is a member of the protected class (a). Thus

In *Bonnard v. Dott* (b), the plaintiff borrowed money from, and deposited securities with, a moneylender who was not registered under the Moneylenders Act, 1900. *Held*, that the transaction was illegal and that the moneylender could not recover the money advanced, but that, since the Act was intended for the protection of borrowers, the plaintiff could recover his securities upon repaying the amount lent.

In *Barclay v. Pearson* (c), a newspaper conducted a competition which was held to be a lottery within the Lottery Acts and therefore illegal. *Held*, that as these Acts were for the protection of competitors, any of them could bring an action for the recovery of their entrance fees. *Held, also*, that these fees were paid to the newspaper as a stakeholder and therefore, even after the competition was finished, could be recovered by any competitor who before the money was paid to the winner had given notice to the newspaper not to part with his entrance fee.

(iv) Where an agent receives money for his principal he must account for it to his principal, even though it is paid under an illegal contract between his principal and the person

(r) *Feret v. Hill*, 15 C. B. 207; *Alexander v. Rayson*, [1936] 1 K. B. 169; 105 L. J. K. B. 148.

(s) *Reynell v. Sprye*, 14 Me. & G., at p. 69; 21 L. J. Ch. 638; 91 R. L. 225; *Atkinson v. Denby*, 7 H. & N. 931, 31 L. J. Ex. 362; *Parkinson v. College of Ambulance, Ltd.* (*ante*, p. 166).

(t) *Hughes v. Liverpool, etc., Friendly Society*, [1916] 2 K. B. 482; 85 L. J. K. B. 1613.

(u) *Harse v. Pearl Life Assurance*, [1904] 1 K. B. 558; 73 L. J. K. B. 373.

(a) *Kearley v. Thompson*, 24 Q. B. D., at p. 716.

(b) [1906] 1 Ch. 740; 75 L. J. Ch. 416.

(c) [1893] 2 Ch. 151; 62 L. J. Ch. 636.

who pays the money (d). But this exception does not apply where the contract *between the principal and the agent* is illegal (e).

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(d) *Tennant v. Elliott*, 1 B. & P. 3; 4 R. R. 755; *Farmer v. Russell*, 1 B. & P. 296; see also *Nicholson v. Gooch*, 5 E. & B., at p. 1018; 25 L. J. Q. B. 137; 103 R. R. 842. *A fortiori*, if the contract is only void: *Beeston v. Beeston*, 1 Ex. D. 13; 45 L. J. Ex. 230.

(e) *McGregor v. Lowe*, 1 C. & P. 200; see also *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496; 65 L. J. Ch. 238.

## CHAPTER V

## ASSIGNMENT OF CONTRACT

As a general rule, a contract cannot impose liabilities or confer rights upon a third person who is not a party to it (a). In certain circumstances, however, a third party may take the place of the original contractor.

**Assignment of liabilities.**—The burden of a contract, *i.e.*, the obligation to perform it, cannot be *assigned*. If, however, its performance requires no special skill and contains no personal element, the promisee cannot object to its being performed by a sub-contractor of the promisor, who alone, nevertheless, can sue or be sued (b); but if the promisor was selected “with reference to his individual skill, competency, or other qualification”, so that his personal performance is of the essence of the contract, he cannot delegate performance to a third party without the consent of the promisee, who, on the unwillingness or disability of the promisor to execute the work personally, may treat the contract as at an end (c).

The burden of a contract may, however, pass to a third party in many ways. Thus

- (i) It may be transferred by novation, *i.e.*, by a new agreement in which a third party joins (d).
- (ii) It may pass by operation of law. So, except in the case of a personal contract, the burden of a contract passes on the death of the promisor, to his personal representatives (e), and, on his bankruptcy, to the trustee in bankruptcy (f).

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(a) See *ante*, p. 99.

(b) *British Waggon Co. v. Lea*, 5 Q. B. D. 149; 49 L. J. Q. B. 321.

(c) *Id.*, *Robson v. Drummond*, 2 B. & Ad. 303; 9 L. J. K. B. 187; 36 B. R. 569; and see *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B., at pp. 668, 669; [1903] A. C. 111; 72 L. J. K. B. 834.

(d) *Post*, p. 204.

(e) *Wentworth v. Cork*, 10 Ad. & El. 42; 8 L. J. Q. B. 230; *Farrow v. Wilson*, L. R. 1 C. P. 714; 38 L. J. C. P. 326; *Imed Angullia v. Estate and Trust Agencies* (1927), *Ltd.*, [1938] A. C. 621; 107 L. J. P. C. 71. By s. 80 of the Law of Property Act, 1925 (re-enacting similar provisions of the Conveyancing Act, 1881), it is provided that a covenant and a bond and an obligation or contract under seal made after December 31, 1881, binds the real as well as the personal estate of the person making the same unless a contrary intention is expressed in the covenant. See *Kirk v. Eustace*, [1937] A. C. 491; 106 L. J. K. B. 617.

(f) Bankruptcy Act, 1914, s. 30. The trustee may, however, disclaim an unprofitable contract. *Id.*, s. 34.

It may also bind a third party by *privity of estate*.  
Thus

(a) When land is leased the burden of a covenant made by the lessor or the lessee may run with, and bind subsequent owners of, the reversion or the lease. This, however, applies only to covenants which "touch and concern" the land itself, *i.e.*, which affect the nature, quality or value of the land itself or the mode of using and enjoying it (g); it does not apply to covenants for the personal benefit of the covenantee, such as a covenant by a lessor to do something on adjoining land (h).

(b) When a *negative* covenant restricting the use of the land is entered into by a purchaser or lessee of land, with the intent of binding the land bought or leased for the benefit of other land of the covenantee, the burden of the covenant may in Equity run with, and be imposed upon the subsequent owners of, the land sold or leased, unless they are purchasers for value who obtain the legal estate in the land without notice of the covenant.

**Assignment of rights.**—The benefit of a contract, *i.e.*, the right to enforce it, may similarly be transferred by novation, and, except in the case of a personal contract, passes to the personal representatives or trustee in bankruptcy of the promisee.

So also, when land is leased, the benefit of a covenant touching and concerning the land made by the lessor or lessee may run with the land which is leased or with the reversion; and when land is sold the benefit of a negative covenant restricting its use may run with other land of the vendor for the protection of which it was imposed.

But, unlike the burden of a contract, the benefit of a contract is also capable of assignment, being a *chose in action*. The term "chose in action" is merely the antithesis to chose in possession, all personal property being either a mere right, enforceable by action, such as the right to payment of a debt, or a physical object which is capable of possession (i). The expression is not, however, limited to rights under a contract;

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(g) *Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q. B., at p. 89; 68 L. J. Q. B. 448.

(h) *Thomas v. Hayward*, L. R. 4 Ex. 811; 38 L. J. Ex. 175.

(i) *Allgemeine Versicherungs Gesellschaft Helvetia v. Administrator of German Property*, [1981] 1 K. B., at p. 704; 100 L. J. K. B. 290.

it includes "all personal rights of property which can only be claimed or enforced by action and not by taking physical possession" (k).

A chose in action is legal if, before the Judicature Act, the right could be enforced in a Court of law; it is equitable if it was a right enforceable only in Equity. The views of the Common Law and of Equity with regard to choses in action differed. The Common Law regarded their assignment as merely the assignment of the right to bring an action and so savouring of maintenance. Equity, on the other hand, regarded them as property and in some respects considered their assignment as equivalent to the creation of a trust in favour of the assignee.

In this chapter the only choses in action that will be considered are rights arising under a contract. These may be assigned by either a legal or an equitable assignment.

*Legal Assignments.*—In the Common Law Courts the assignment of a chose in action did not as a general rule enable the assignee to sue upon it in his own name. But the assignee might sue in the name of the assignor whom Equity, by means of an injunction, would compel to allow the use of his name if he had entered into a binding contract to do so or if the assignment was for value (l).

Before 1873 the only exceptions to the Common Law rule were:—

- i. Assignments by or to the Crown of choses in action which were certain in amount (m).
- ii. Assignments permitted by particular statutes—e.g., of bills of lading (n) and policies of life (o) or marine (p) insurance.
- iii. Assignments recognised by the law merchant—e.g., by negotiable instruments.
- iv. Assignments by operation of law, as on death (q), or

(k) *Torkington v. Mager*, [1902] 2 K. B., at p. 130; 72 L. J. K. B. 336.

(l) *Re Winsterton*, [1919] 2 Ch., at p. 111; 88 L. J. Ch. 392; *Ellis v. Torkington*, [1920] 1 K. B., at p. 406.

(m) *Lambert v. Taylor*, 4 B. & C. 138; 3 L. J. K. B. 160; *Myles v. Williams*, 1 Gilb. 321.

(n) Bills of Lading Act, 1855.

(o) Policies of Assurance Act, 1867.

(p) Marine Insurance Acts, 1868, 1906.

(q) *Marshall v. Broadhurst*, 1 Cr. & J. 408; 9 L. J. (o.s.) Ex. 103; *Raymond v. Fitch*, 2 Cr. M. & R., at pp. 596, 597; 5 L. J. Ex. 45. This does not apply to personal contracts, though the personal representatives may sue in respect of any right of action vested in the deceased, as, e.g., to recover any money earned by the deceased and accrued due in his lifetime: *Stubbs v. Holywell Ry.*, 1 L. R. 2 Ex. 311; 39 L. J. Ex. 166.

bankruptcy (r), or in case of covenants running with land (s).

Now, however, by s. 186 of the *Law of Property Act, 1925* (re-enacting in substance s. 25 (6) of the *Judicature Act, 1873*), "Any absolute assignment by writing under the hand of the assignor (*not purporting to be by way of charge only*) of any debt or other legal thing in action, of which *express notice in writing* has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (*subject to equities having priority over the right of the assignee*) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; (c) the power to give a good discharge for the same, without the concurrence of the assignor: Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice (a) that the assignment is disputed by the assignor or any person claiming under him; or (b) of any other opposing or conflicting claims to such debt or thing in action, he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into Court under the provisions of the *Trustee Act, 1925*".

To satisfy this section:—

1. The assignment must be *absolute* and must *not* purport to be *by way of charge only*.—If an assignment unconditionally passes to the assignee the whole right of the assignor, the mere fact that it is by mortgage or otherwise by way of security, so that the assignor may have an express or implied equity to redeem, does not prevent it from being absolute (t).

Thus, in *Tancred v. Delagoa Bay, etc., Co. (u)*, A by a deed of mortgage assigned to B a debt due to him from C, to secure an advance from B of £3,000 and further advances up to £5,000. The mortgage contained a proviso for redemption and re-assignment.

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(r) See now the *Bankruptcy Act, 1914*, ss. 38, 48, 167. This, again, does not apply to personal contracts: *Gibson v. Carruthers*, 8 M. & W., at p. 333. But if the bankrupt sues for damages for breach of such a contract committed after the bankruptcy, the trustee can claim the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance: *Bailey v. Thurston & Co., Ltd.*, [1908] 1 K. B. 187; 72 L. J. K. B. 36. Rights of action for a breach of contract committed *before* bankruptcy pass to the trustee except where the breach results merely in injury to the person or feelings of the bankrupt: *Bickham v. Drake*, 2 H. L. C. 579; 12 L. J. Ex. 486.

(s) *Ante*, p. 198.

(t) *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190; 71 L. J. K. B. 630, reviewing earlier authorities.

(u) 28 Q. B. D. 239; 58 L. J. Q. B. 459.

*Held*, that, as there was an absolute transfer of the debt, the assignment was not by way of charge, merely because of the proviso for redemption.

So also, in *Hughes v. Pump House Hotel Co. (x)*, A executed a document in which, in consideration of his bankers continuing a banking account with him, and by way of continuing security for all money due or to become due to them on the account, he assigned to them all money due or to become due to him under a building contract and empowered them to settle and adjust all accounts under the contract, to give effective receipts for the money assigned and to sue for such money. *Held*, that as this instrument passed all A's rights to the money it constituted an assignment which was absolute and not by way of charge only.

And an assignment may be absolute though a trust is created in favour of the assignor, as, *e.g.*, where debts were assigned to a person who was to collect them and pay the proceeds to the assignor (a).

But an assignment which is conditional (b), or which is an assignment of such part of the fund as shall be sufficient to pay a debt, and so is merely by way of charge, is not within the section (c).

Thus, in *Durham Brothers v. Robertson (b)*, A gave to B a document, by which, in consideration of money advanced from time to time by B, he charged a sum of £1,080, which would become due to him on the completion of certain buildings, as security for such advances, and assigned his interest in the sum until the money, with interest, should be paid. *Held*, that this was not an absolute assignment because it was (i) conditional and (ii) by way of charge only.

Again, in *Jones v. Humphreys (c)*, A, in consideration of an advance, assigned to B "so much and such part of my income, salary and other emoluments as shall be necessary and requisite for payment to you of the sum of £22 10s., or of any further sums in which I may become indebted to you". *Held*, that this was an assignment by way of charge only, being merely an assignment of such part of the income, etc., as would be sufficient security.

And even an absolute assignment of *part* of a debt or chose in action is not within the section (d).

2. *The assignment must be in writing under the hand of the assignor.*

3. *It must be of a debt or existing legal chose in action.—*  
 "An assignment purporting to assign a future debt can

(x) *Ubi supra*.

(a) *Comfort v. Betts*, [1891] 1 Q. B. 737.

(b) *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765; 67 L. J. Q. B. 484.

(c) *Jones v. Humphreys*, [1902] 1 K. B. 10; 71 L. J. K. B. 23.

(d) *Re Steel Wing Co.*, [1921] 1 Ch. 349; 90 L. J. Ch. 116; *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K. B. 81; 102 L. J. K. B. 241. But it may be the subject of an equitable assignment (*post*, p. 197).

operate only as a contract to assign. It remains a purely equitable assignment which will be enforced . . . only if given for value" (e).

4. *Notice in writing must be given.*—Under the Act notice is necessary in order to transfer the legal rights and powers of the assignor to the assignee. It may be given at any time before action (f), either by the assignor or assignee, and even after the death of either (g).

5. *The assignment is subject to equities.*—That is to say, the assignee can have no greater rights than the assignor and therefore takes subject to all defects in the title of the assignor, and to all rights of set-off and all defences existing or arising out of circumstances existing at the date of the notice of the assignment (h).

A debtor may, however, contract with his creditor that he will not, as against a transferee, set up any rights which he might have set up against the creditor (i). Thus, debentures usually contain a provision that they shall be assignable free from equities.

But, since an assignee is now given a legal right of action and does not require the assistance of Equity, the assignment need not have been for value (k).

*Equitable assignments.*—Equity as a general rule permitted the assignee of a chose in action to sue in his own name. If, however, the chose in action was a legal one, the assignor must be joined either as co-plaintiff or co-defendant in order to prevent him from subsequently suing at law in his own name (l).

In the case of an assignment of an *equitable* chose in action Equity merely required that it should be complete in the sense that nothing more remained to be done by the assignor (m).

(e) *Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K. B., at p. 5; 111 L. J. K. B. 465.

(f) *Bateman v. Hunt*, [1904] 2 K. B. 530; 73 L. J. K. B. 782.

(g) *Walker v. Bradford Old Bank*, 12 Q. B. D., at p. 538; 53 L. J. Q. B. 280. The date of the notice is the date of its receipt by the debtor: *Holt v. Heatherfield Trust, Ltd.*, *ubi supra*.

(h) See *Brice v. Bannister*, 3 Q. B. D., at p. 578; *Stoddart v. Lemon Trust*, [1912] 1 K. B. 181; 81 L. J. K. B. 140; *Lawrence v. Hayes*, [1927] 2 K. B. 111; 96 L. J. K. B. 658.

(i) See *Re Goy & Co.*, [1900] 2 Ch., at p. 154; 69 L. J. Ch. 481.

(k) *Harding v. Harding*, 17 Q. B. D., at p. 44; 55 L. J. Q. B. 462; *Re Westerton*, [1919] 2 Ch. 104; 88 L. J. Ch. 392.

(l) *Durham Brothers v. Robinson*, [1898] 1 Q. B., at p. 769; 67 L. J. Q. B. 484. But if the assignment was of an *equitable* chose in action he might sue alone: *Fulham v. McCarthy*, 1 H. L. C., at p. 817.

(m) *Kekewich v. Manning*, 1 De G. M. & G. 176; *Re Williams*, [1917] 1 Ch., at p. 8; 86 L. J. Ch. 36; *Re Westerton*, *ubi supra*.



But in dealing with an equitable assignment of a legal chose in action it refused to give any assistance to an assignee who had not given value for the assignment (n).

It is still possible, independently of s. 186 of the Law of Property Act, 1925, to make a valid *equitable* assignment of a legal chose in action, and an assignment which for want of notice or otherwise does not come within the provisions of that Act may be enforceable as an equitable assignment. But in such cases the assignee has not the legal rights or remedies of the assignor and in any proceedings for the recovery of the chose in action the former practice of the Courts of Equity as to making the assignor a co-plaintiff or co-defendant must still be followed (o).

No particular form of words was or now is necessary to constitute an equitable assignment of a chose in action, so long as it appears plainly that the benefit of it is intended to be transferred to the assignee (p). It need not even be in the form of an assignment: "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person" (q).

Thus an equitable assignment may be constituted by an agreement between a creditor and a debtor that the debt owing shall be paid out of a specific fund coming to the debtor, or by an order given by a debtor to his creditor upon a person owing money to the debtor, directing such person to pay money to the creditor (r). And there may be a valid equitable assignment of part of a debt (s).

But an assignment cannot be created by a *revocable* authority from one person to another authorising the latter to receive money due to the former and to pay it to another

(n) *Re Earl of Lucan*, 15 Ch. D. 470; 60 L. J. Ch. 40; *Re Williams*, [1917] 1 Ch., at p. 7; *Re Westerton*, [1919] 2 Ch. 104; 88 L. J. Ch. 892.

(o) *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A. C. 414; 72 L. J. K. B. 881; *Brandt's Sons & Co v. Dunlop Rubber Co.*, [1905] A. C., at p. 162; 74 L. J. K. B. 893.

(p) *Durham Brothers v. Robertson* (*ante*, p. 196), in which it was held that there was a good equitable assignment.

(q) *Brandt's Sons & Co v. Dunlop Rubber Co.*, [1905] A. C., at p. 462.

(r) *Rodick v. Gandell*, 1 De G. M. & G. 768, at p. 777; 99 R. R. 282.

(s) See *Williams v. Atlantic Assurance Co., Ltd.*, [1938] 1 K. B. 81; 102 L. J. K. B. 241.

person (r). And it can be created only upon some definite fund (t). Thus

In *Gorringe v. Irwell, etc., Works* (u). A being indebted to B as the acceptor of a bill of exchange wrote them as follows: "We . . . hold at your disposal the sum of £425, due to us from Messrs. (' & Co., . . . until balance of our acceptance of £660 in your favour has been paid." *Held*, a good equitable assignment.

In *Rodick v. Gandell* (r), a railway company was indebted to A, who was indebted to his bankers. A wrote to the *solicitors* of the company authorising them to receive the money due to him from the company and to pay it to the bank. The solicitors by letters promised the bankers to pay them. *Held*, that this was not a valid equitable assignment.

In *Percival v. Dunn* (t), A being a debtor to B, but a creditor of C, gave to B the following letter addressed to C: "Please pay B the amount of his account . . . £42 for goods delivered." *Held*, that this was not a valid equitable assignment as there was nothing to show that the sum mentioned was to be paid out of any specific fund which C was under any obligation to pay.

But all equitable assignments were and still are subject to equities.

And they were and still are subject to the rule that the assignee must give notice to the debtor or holder of the fund assigned, *not*, as now in the case of legal assignments, in order to complete his title, but in order to prevent himself from being postponed to a subsequent assignee giving notice first (a).

There are, however, certain cases in which an assignment of rights under a contract cannot be made either as an equitable assignment or under the provisions of the Law of Property Act, 1925. Thus an assignment of a pension may be void (b).

Moreover the benefit of any contract which involves special personal qualifications on the part of the promisee cannot be assigned by him unless he has completely performed his obligations under the contract (c). Nor can the benefit of a contract

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(t) *Percival v. Dunn*, 29 Ch. D. 128; 54 L. J. Ch. 570; *Western Wagon, etc., Co. v. West*, [1892] 1 Ch. 271.

(u) 34 Ch. D. 128; 56 L. J. Ch. 85.

(a) *Gorringe v. Irwell, etc., Works* (*ubi supra*). This is in accordance with the equitable rule in *Dearle v. Hall* (27 R. R. 1; 3 Russ. 1), by which, as between successive assignees of equitable interests in personalty, priority was and is still obtained by the first assignee giving notice to the trustee or legal owner of the fund. By s. 137 of the Law of Property Act this rule was, subject to certain conditions, made applicable to dealings with equitable interests in land, capital money and securities representing capital money effected after the commencement of the Act.

(b) *Ante*, p. 165.

(c) *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. R. 660, at pp. 668, 669.

be assigned if it was made with a view to the personal requirements of the promisee (d).

So, in *Kemp v. Baerselman* (d). A contracted to supply to B, a confectioner, all the eggs required by him for his manufacturing purposes for one year. B assigned his business to a company with a larger business and greater requirements. Held, that the contract was merely to supply B's personal requirements and that the benefit was not assignable.

On the other hand, in *Tolhurst's Case* (e), where A contracted that he would for fifty years take from particular quarries all the chalk required for particular cement works, it was held that the benefit of this contract could be assigned because the supply was to be measured by the requirements of a particular place and it made no difference who was the owner of that place.

Similarly an option to purchase contained in an ordinary hire-purchase agreement is not personal and can be assigned (f).

A right of action in *tort* is not assignable at law or in Equity. In cases of contract the right which is assignable is the right to performance of the contract which, if unperformed, is enforceable by action; but the right created by a *tort* is a bare right of action, the assignment of which was never permitted either at law or in Equity, on the ground that it savoured of or was likely to lead to maintenance (g).

But the *damages* which may be recovered in a pending action of *tort* can be the subject of an equitable assignment because all that is assigned is the fruit of the action and such an assignment does not give the assignee any right to interfere with the proceedings in the action and so does not savour of maintenance (h). But an assignment of any *future chose in action*, e.g., future book debts, operates merely as an agreement to assign which, if supported by valuable consideration, constitutes a trust or creates a charge which binds the fund as soon as the contract is capable of performance.

**Assignment of moneylenders' debts.**—By s. 16 of the *Money-lenders Act*, 1927, it is provided that, where any debt in respect of money lent by a moneylender, whether before or after the Act, or in respect of interest on any such debts or the benefit of any agreement or security in respect of any such debt or interest is assigned by an assignment *inter vivos* otherwise than by operation of law, the assignor (whether he is the

(d) *Kemp v. Baerselman*, [1906] 2 K. B. 804; 75 L. J. K. B. 878.

(e) [1903] A. C. 414; 72 L. J. K. B. 881.

(f) *Whitchy, Ltd. v. Hilt*, [1918] 2 K. B. 808; 87 L. J. K. B. 1058.

(g) *Defries v. Milne*, [1913] 1 Ch. 98; 82 L. J. Ch. 1.

(h) *Glegg v. Bromley*, [1912] 3 K. B. 474; 81 L. J. K. B. 108.

moneylender by whom the money was lent or a previous assignee) must, before the assignment is made—

- (a) give to the assignee notice in writing that the debt, agreement or security is affected by the Act; and
- (b) supply to the assignee all information necessary to enable him to comply with s. 8 of the Act (i).

Any person acting in contravention of any of these provisions is liable to indemnify any other person who is prejudiced thereby and is also guilty of a criminal offence.

By s. 17 of the Act it is provided that, notwithstanding any such assignment, the provisions of the Act shall continue to apply as respects any debt to a moneylender in respect of money lent by him *after* the commencement of the Act (k) or interest on money so lent, or of the benefit of any agreement made or security taken in respect of any such debt or interest; but

- (a) notwithstanding anything in the Act—
    - i. any agreement with, or security taken by, a moneylender in respect of money lent by him after the commencement of the Act shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of the Act and any person deriving title under him;
    - ii. any payment or transfer of money or property made *bona fide* by any person on the faith of the validity of any such agreement or security shall, in favour of such person, be as valid as if the agreement or security had been valid;
    - iii. the provisions of the Act limiting the time for proceedings in respect of money lent shall not apply to proceedings in respect of any such agreement or security commenced by a *bona fide* assignee or holder for value without notice that the agreement or security was affected by the Act, or by any person deriving title under him;
- but in every such case the moneylender shall be liable to indemnify the borrower or any other person prejudiced

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(i) *Ante*, p. 158.

(k) Agreements with or securities taken by a moneylender *before* the commencement of the Act, and payments or transfers of money or property made, either *before* or *after* the commencement of the Act, on the faith of the validity of any such agreement or security, are still governed by similar provisions contained in s. 1 of the Moneylenders Act, 1911, which otherwise is repealed.

by this section, and nothing in this section shall render valid an agreement or security in favour of, or apply to proceedings commenced by, an assignee or holder for value who is himself a moneylender :

- (b) for the purposes of this Act and the Moneylenders Act, 1900, the provisions of s. 199 (*i.e.*, the "constructive notice" section) of the Law of Property Act, 1925, shall apply as if the expression "purchaser" included a person making such payment or transfer as aforesaid.

Nothing in this section, however, is to render valid any agreement, security or other transaction which, apart from the Act, would have been void or unenforceable.

## CHAPTER VI

DISCHARGE OF CONTRACT AND OF RIGHTS OF ACTION  
ARISING FROM BREACH OF CONTRACTSECTION 1.—*Discharge of Contract*

A CONTRACT is discharged when all the liabilities of the promisor have come to an end. This may take place—

1. By agreement.
2. By operation of law.
3. By the subsequent illegality or impossibility of performance.
4. By performance.
5. By breach.

1. **Discharge by agreement.**—A contract may be discharged by a subsequent contract under seal or for valuable consideration.

If a contract is still executory, so that rights and obligations exist on both sides, it may before breach be discharged by mutual agreement in any form, the consideration being the relinquishment by each party of his rights (*a*). A mere voluntary forbearance by one party to insist upon strict performance by the other party does not, however, constitute a fresh contract discharging the existing contract (*b*).

But the discharge of a contract which has been executed by one party, or the discharge of rights of action arising from breach of contract, can be effected only by release under seal (*c*) or for a new consideration (*d*).

At Common Law a contract made by deed could not be discharged otherwise than by deed. In Equity, however, a contract under seal might be discharged by a new agreement

(*a*) *Foster v. Dauber*, 6 Ex. 889; 20 L. J. Ex. 365; 86 R. R. 506.

(*b*) See *Hickman v. Haynes*, L. R. 10 C. P. 598; 19 L. J. C. P. 358; 32 L. T. 878 (reviewing earlier authorities); *Levey & Co. v. Goldberg*, [1922] 1 K. B. 688; 91 L. J. K. B. 349.

(*c*) An unconditional covenant not to sue has the same effect as a release: *Newington v. Levy*, L. R. 6 C. P., at p. 191; 40 L. J. C. P. 29; see also *Ford v. Beech*, 11 Q. B. 852; 17 L. J. Q. B. 111.

(*d*) See *Atlantic Shipping, etc., Co. v. Dryfus & Co.*, [1922] 2 A. C., at pp. 261, 262; 91 L. J. K. B. 518; 127 L. T. 411; 38 T. L. R. 531. This does not apply to negotiable instruments: Bills of Exchange Act, 1882, s. 62, *post*, Part III, Chapter VI.

made for valuable consideration; and since the Judicature Act, 1873, the equitable rule prevails in all Courts (e).

Where, however, the original contract was one for which writing was necessary, it cannot be *varied*, although it may be wholly rescinded, by an agreement which is in itself unenforceable for want of writing (f).

The new consideration for the discharge of a contract may take the form of a new contract. Here there is a *novation*, which means this: "that, there being a contract in existence, some new contract is substituted for it, *either between the same parties or between different parties*, the consideration mutually being the discharge of the old contract" and "the undertaking of rights and liabilities by the new party" (g).

Novation differs from assignment in that it introduces a new contract and requires a threefold agreement between the existing parties and the new party; mere assignment transfers rights acquired under the old contract and may be made without the assent of the debtor (h). Common examples of novation occur where a new partner is introduced into a firm (i), or where a debtor makes a composition with his creditors (k).

Discharge may also take place *under an express or implied condition of the original contract*.

A condition which affects the *existence* of a contract or the *right to sue* under a contract may be either a condition precedent, a condition subsequent, or a condition concurrent.

Thus parties to a contract may agree that the contract shall not become operative, or that some particular right or obligation shall not come into existence, until the happening of some particular event, either within or without the control of either of

(e) *Steebs v. Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 802; *Berry v. Berry*, [1929] 2 K. B. 316; 96 L. J. K. B. 348; and see *Nash v. Armstrong*, 10 C. B. (N.S.) 259; 30 L. J. C. P. 286.

(f) *Goss v. Nugent*, 5 B. & Ad., at p. 65; 2 L. J. K. B. 127; 39 R. R. 392; *Morris v. Baron & Co.*, [1918] A. C. 1; 87 L. J. K. B. 147; *British and Benington's Ltd. v. N. W. Cuchar Tea Co.*, [1923] A. C. 48; 92 L. J. K. B. 62; *Besseler, Waichter, Cloer & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 109; 107 L. J. K. B. 365.

(g) *Searf v. Jardine*, 7 A. C., at p. 351; 51 L. J. Q. B. 612; *Bradford Old Bank v. Sulcliffe*, [1918] 2 K. B., at p. 849; 88 L. J. K. B. 85. See also *Thornhill v. Sears*, 8 C. B. (N.S.) 831; 125 R. R. 902 (novation by change of terms).

(h) [1918] 2 K. B., at p. 849.

(i) See *Rolfe v. Flouren*, L. R. 1 P. C. 27; 35 L. J. P. C. 13; 146 R. R. 96; and *post*, Part III Chapter I.

(k) *Post*, p. 215.

them, as, for instance, that the contract shall not be binding until some third person has approved of its terms or that no payments shall be made under it until certain accounts have been taken. In such case the approval is a *condition precedent* to the existence of the contract, and the taking of the accounts is a *condition precedent* to the accrual of the right or obligation to demand or make any payment.

On the other hand, parties may agree that the contract shall cease to exist on the happening of a certain event, as, e.g., on the outbreak of a European war within a given time. The outbreak of such a war is then a *condition subsequent*, the occurrence of which terminates the existence of the contract (l).

So also it may be an implied term of a contract that it shall be discharged by a given event or by notice (m). Thus in every contract of service there is, in the absence of any express agreement to the contrary, an implied term that it may be determined by reasonable notice (n).

Where there are covenants by both parties to a contract they may be of three kinds (o).

They may be *independent covenants* so that each party is bound to perform his covenant whether or not the other party performs or is even ready and willing to perform his part.

The performance by one party of his part may be a *condition precedent* to the performance by the other party of his part.

The acts to be performed by each party may be such as have to be performed concurrently. In this case there are said to be *concurrent conditions* and neither party can maintain an action without showing that he has performed or is willing to perform his part. Thus by s. 28 of the Sale of Goods Act, 1893, it is provided that upon a sale of goods, "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions".

(l) See *New Zealand Shipping Co. v. Société des Ateliers de France*, [1919] A. C. 1; 87 L. J. K. B. 746. But if the event is one which either party can by his own act or omission bring about, the stipulation cannot be insisted upon by a party who has wrongfully brought it about: *id.*, at pp. 12, 13.

(m) *Crediton Gas Co. v. Crediton Urban District Council*, [1928] Ch. 174; 97 L. J. Ch. 184. See also *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1950] W. N. 338; [1950] 2 All E. R. 390. The Court may restrict the terms of a contract to the circumstances contemplated by the parties if circumstances have altered and it is satisfied that the parties as reasonable people cannot have intended that the contract should apply to the new situation.

(n) *Post*, Part III, Chapter II, Section 1.

(o) *Kingston v. Preston*, cited in 2 Dougl. K. B., at p. 289.



Whether or not in any particular case covenants are independent or conditional depends as a rule upon the apparent intention of the parties and the circumstances of the case and, where the contract is contained in a written instrument, upon the construction of the instrument (*p*). Generally speaking, however, when mutual covenants go to the whole of the consideration on both sides (*q*) or are intended to go to the root of the contract (*r*), they are mutual conditions. But, if they only go to part of the consideration or partially affect the contract, so that the breach may be compensated by damages, they are independent covenants (*s*).

Thus, in *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Council* (*t*), the plaintiffs contracted with the defendants that they would for five years from August, 1911, light their district and would for that purpose provide gas standards, lamps and other plant, supply gas, and light, extinguish and maintain the lamps; the defendants on their part contracted to pay an annual sum, payable by quarterly instalments and calculated upon the number of lamps. The contract was performed until January, 1915, when the lighting of the streets was prohibited by an Order made under the Defence of the Realm Regulation Acts. *Held*, that as the payment of the defendants was not merely for the supply of gas but for the entire service to be performed by the plaintiffs, (i) the entire object of the contract was not frustrated, and (ii) the supply of gas was not a condition to the recovery of the quarterly payment.

In the case of a lease the mutual covenants by the lessor and the lessee are for the most part independent, notwithstanding any formal expressions to the contrary. Thus, a covenant of the tenant to pay rent and a covenant by the landlord to repair are independent, and in an action against the landlord for failure to repair he cannot set up as a defence that the tenant has not paid his rent (*u*).

*Joint creditors or debtors.*—A release by one of several joint creditors operates as a release by all (*x*), but a covenant by one of several joint creditors not to sue is no bar to an action brought by the other joint creditors (*y*). A release of one of several

(*p*) *Glazebrook v. Woodrou*, 8 T. R. 366; *Roberts v. Brett*, 11 H. L. C. 387; 31 L. J. C. P. 211.

(*q*) *Boone v. Eyre*, 2 Wm. Bl. 1312; *Ritchie v. Atkinson*, 10 East 295.

(*r*) *Bank of China, etc. v. American Trading Co.*, [1894] A. C. 266; 68 L. J. P. C. 92.

(*s*) *Greaves v. Legg*, 9 Ex. 709; 29 L. J. Ex. 228; *Huntoon v. Kolynos (Incorporated)*, [1930] 1 Ch., at p. 558, 99 L. J. Ch. 821.

(*t*) [1916] 2 K. R. 428; 85 L. J. K. R. 1759.

(*u*) *Taylor v. Webb*, [1936] W. N. 91.

(*x*) *Jones v. Herbert*, 7 Taunt. 421; 18 R. R. 520; *Wilkinson v. Lindo*, 7 M. & W. 81; 10 L. J. Ex. 91; 56 R. R. 638.

(*y*) *Walmesley v. Cooper*, 11 Ad. & El. 216; 10 L. J. Q. B. 49.

persons who are jointly or jointly and severally liable operates as a release of all, unless the creditor expressly reserves his right against the others (z); but a mere covenant not to sue one of several joint debtors does not release the others (a).

2. Discharge by operation of law takes place in four cases :-

- i. Where the contract, without any change of terms or parties, is merged into another contract of a higher nature (b).
- ii. Where the rights and liabilities become vested in the same person (c).
- iii. Where, otherwise than by accident or mistake, a material alteration to a written instrument is made by the plaintiff, or by a person for whom he is responsible and for his benefit, without the consent of the other party (d).
- iv. By an order of discharge in bankruptcy, as regards liabilities provable in the bankruptcy (e).

8. Discharge by impossibility of performance.—If parties contract to do something which at the time of the contract is *absolutely* incapable of performance, the contract is void *ab initio* (f).

Thus, a contract for the sale of specified goods which, without the knowledge of the seller, had perished when the contract was made, is void (g).

So also a contract is void where "the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have contracted" (f).

Where, however, a person enters into a positive contract to perform something which is not absolutely impossible, he

(a) *North v. Wakefield*, 18 Q. B. 536; 18 L. J. Q. B. 314; *Re E. W. A.*, [1901] 2 K. B., at p. 648; 70 L. J. K. B. 810.

(b) *Hutton v. Eyles*, 6 Taunt. 289; 16 R. R. 619; *Willis v. De Castro*, 1 C. B. (n.s.) 216; 27 L. J. C. P. 248. A release by which the creditor reserves his rights against co-debtors amounts merely to a covenant not to sue (*id.*).

(c) *Ante*, pp. 71, 87.

(d) See, e.g., s. 61 of the Bills of Exchange Act, 1882, *post*, Part III, Chapter VI.

(e) See Bullen & Leake's Pleadings (3rd ed.), p. 185, and cases there cited. See also *Pattinson v. Luckley*, L. R. 10 Ex. 330; 14 L. J. Ex. 180; *Suffell v. Bank of England*, 9 Q. B. D. 555; 51 L. J. Q. B. 401; and s. 64 of the Bills of Exchange Act, 1882, *post*, Part III, Chapter VI.

(f) Bankruptcy Act, 1914, s. 28 (2). Certain liabilities are, however, excepted by s. 28 (1).

(g) *Clifford v. Watts*, L. R. 5 C. P., at p. 588; 40 L. J. C. P. 36.

(g) Sale of Goods Act, 1898, s. 6.

must, in the absence of any express or implied condition to the contrary, perform it or pay damages for not doing so, although in consequence of unforeseen accidents the performance has become unexpectedly burdensome or even impossible (h).

So, in *Hills v. Sughrue* (i), it was agreed by a charterparty that a ship should proceed to a particular place and there load a full cargo of guano. Held, that the contract was not discharged because there was no guano at that place.

So also if a contractor enters into a positive contract to complete works in a certain time, the contract is not discharged merely because he cannot complete them in that time (k).

So also where there was a contract for the delivery of goods "unforeseen circumstances excepted", it was held that these words referred only to such circumstances as rendered performance of the contract absolutely impossible and that it was not enough for the defendant to show that he could not obtain the goods from the source which he contemplated when entering into the contract (l).

But wherever performance of a contract has become totally or substantially impossible by a supervening event beyond the control of either party, and not within the contemplation of the parties at the time of making the contract nor provided for by any express term of the contract, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, and there is no undertaking to be bound in any event, both parties are by its occurrence excused from further performance, a condition, arising from the presumed intention of the parties, being implied that in such a case the contract shall come to an end (m).

Such a condition may be implied where the event which makes the contract incapable of performance is:—

(h) *Taylor v. Caldwell*, 3 B. & S. 826, at p. 838; 82 L. J. Q. B. 164; *Horlock v. Beal*, [1916] 1 A. C., at pp. 519, 520; 85 L. J. K. B. 602.

(i) 15 M. & W. 253.

(k) *Jones v. St. John's College*, L. R. 6 Q. B. 115; 40 L. J. Q. B. 80.

(l) *Wills & Sons, Ltd. v. Cunningham, Sons & Co.*, [1924] 2 K. B. 220; 93 L. J. K. B. 100b.

(m) *Taylor v. Caldwell* (ubi supra); *Horlock v. Beal* [1916] 1 A. C. 486, at p. 525; 85 L. J. K. B. 602; *Tamplin S.S. Co., Ltd. v. Anglo-Mexican, etc., Co.*, [1916] 2 A. C., at pp. 403, 422; 85 L. J. K. B. 1589; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A. C. 119, at pp. 180, 181; 87 L. J. K. B. 370; *Dank Line, Ltd. v. Capel & Co.*, [1919] A. C. 486; 88 L. J. K. B. 211; *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A. C. 154; 110 L. J. K. B. 483; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A. C. 32; *Morgan v. Manser*, [1947] 2 All E. R. 666.

- i. In a contract for personal services, the death or incapacity of the promisor (n).
- ii. In a contract made on the basis of the continued existence of a specific thing essential to the performance of the contract, the destruction of that thing.

Thus, in *Taylor v. Caldwell* (m), a contract for the hire of a music-hall was held to be discharged by its destruction by fire.

In *Turner v. Goldsmith* (o), on the other hand, a contract by a shirt manufacturer to employ the plaintiff as his agent and traveller for five years was held not to be discharged by the destruction of the defendant's factory by fire, because the contract for employment did not relate only to goods manufactured in that particular factory and hence there was no implied condition that it should continue to exist.

- iii. In a contract made on the basis of the existence, continuance or occurrence of a certain state of affairs or event essential to the performance of the contract, the non-existence, cessation or non-occurrence of that event.

Thus, in *Krell v. Henry* (p), it was held that a contract to hire rooms for the purpose of viewing the coronation procession of King Edward VII was discharged by the failure of the procession to take place, the subject-matter of the contract being "rooms to view the procession".

On the other hand, in *Herne Bay S.S. Co., Ltd. v. Hulton* (q), where the defendant agreed to hire a ship in order to take passengers to see a naval review and for a cruise round the fleet, it was held that the contract was not discharged because the review did not take place. The contract between the plaintiff and the defendant was merely for the hiring of a ship which (as a ship) had nothing to do with the review. So far as the plaintiffs were concerned, the objects of the passengers with regard to sight-seeing were not the foundation or essence of the contract (r).

- iv. A "vital change of circumstances" which renders the performance of the contract impossible, or delays it to such an extent as to frustrate its commercial object (s), or destroys its subject-matter, or interrupts it in such a way that no resumption is reasonably possible (t), as,

(n) *Taylor v. Caldwell* (*ubi supra*); *Robinson v. Davison*, 11 L. R. 6 Ex. 172; 40 L. J. Ex. 172; *Farrow v. Wilson*, L. R. 1 C. P. 711; 38 L. J. C. P. 326.

(o) [1891] 1 Q. B. 544; 60 L. J. Q. B. 247.

(p) [1903] 2 K. B. 740; 72 L. J. K. B. 794.

(q) [1903] 2 K. B. 688; 72 L. J. K. B. 879.

(r) Compare *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 2 K. B. 467; 87 L. J. K. B. 1085, where it was held that the parties to a contract for the sale of timber had not contracted on the basis that a certain method of delivering the timber, which was prevented by war, would continue possible.

(s) See *Horlock v. Beal*, [1916] 1 A. C. 486.

(t) *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C., at p. 114; 95 L. J. P. C. 71.

for example, when performance is prevented or frustrated by British legislation or Government intervention, or by illegality arising from the outbreak of war (*u*), or from a change in the law of a foreign country when that law governs the performance of the contract (*x*). Thus

In *Horlock v. Beal* (*y*), a contract by a seaman to serve on a British ship was held to be discharged by the detention of the ship at Hamburg on the outbreak of war.

In *Baily v. De Crespigny* (*a*), a covenant by A and his assigns not to build on land was held to be discharged on the purchase of the land by a railway company under the compulsory powers given to it by statute.

In *Metropolitan Water Board v. Dick, Kerr & Co.* (*b*), it was held that a contract to construct a reservoir was discharged upon continuance of the work being prohibited under the Defence of the Realm Acts and Regulations, the interruption being such that the contract when resumed would be of a different character.

In *Bank Line, Ltd. v. Capel & Co.* (*c*), a contract to charter a ship was held to be discharged by its requisition by the Government and detention for so long a period as to frustrate the purpose of the contract.

The doctrine of frustration does not, however, apply to a lease, which is more than a mere contract because by it a term of years is created and vested in the lessee (*d*). And, in this respect, there is no difference between a lease of furnished and of unfurnished premises because, in each case, the rent issues out of the land only (*e*).

But a contract is not discharged where the event causing the impossibility, *e.g.*, the exercise of statutory powers by a local authority, could reasonably be supposed to have been in the contemplation of the parties when the contract was made so that it might have been anticipated and guarded against in the contract (*f*).

Nor is it discharged unless the impossibility is caused by something for which neither party is responsible (*g*). Thus

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(*u*) *Esposito v. Bowden*, 7 E. & B., at p. 779; 29 L. J. Q. B. 17. See also *Boissier v. Weil*, [1950] A. C. 327.

(*x*) *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. 287; 89 L. J. K. B. 999.

(*y*) [1916] 1 A. C. 186.

(*a*) L. R. 4 Q. B. 180; 58 L. J. Q. B. 98.

(*b*) *Ubi supra*.

(*c*) *Ubi supra*.

(*d*) *Whitchell Count, Ltd. v. Ettlinger*, [1920] 1 K. B. 680; 89 L. J. K. B. 126; *Matthey v. Curling*, [1922] 2 A. C. 180; 91 L. J. K. B. 593; *Eyre v. Johnson*, [1916] K. B. 101; 1917 L. J. R. 433.

(*e*) *Swift v. Macbean*, [1913] 1 K. B. 375; 111 L. J. K. B. 185.

(*f*) *Walter Harvey v. Walker & Homfrays*, [1931] 1 Ch. 274; 100 L. J. 93.

(*g*) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524; 104 L. J. P. C. 68.

A chartered from B a steam trawler for use in the fishing industry. At the time of the charter both parties knew that it would require a licence from the Canadian Minister. A was using five trawlers and applied for five licences. He was told that only three licences would be granted and named three trawlers excluding the one chartered from B which accordingly could not be used. He then claimed that the charterparty had become impossible of performance. *Held*, that he was not discharged, because the impossibility was due to his own election (h).

When frustration is *prima facie* established it is for the party against whom it is set up to prove that it was due to the fault of the party setting it up and not for the party setting it up to prove absence of any fault on his part (i).

Where a contract has been discharged by impossibility of performance or frustration the following provisions as to the rights and liabilities of the parties have been made by the *Lara Reform (Frustrated Contracts) Act, 1948*.

By s. 1 it is provided that:—

(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose

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(h) *Id.*

(i) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corporation Ltd. (ubi supra).*

of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,—

- (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and
  - (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.
- (4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sums as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance:

Provided that this subsection shall not be taken as preventing the court, in considering under subsection (8) of this section the effect of the said circumstances in relation to any valuable benefit, from taking into account any sum payable to the benefited party, in respect of the loss of or damage to the said benefit, under any contract of insurance.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

By s. 2 it is provided that:—

- (1) This Act shall apply to contracts, whether made before

or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

(4) Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

(5) This Act shall not apply to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea.

(6) This Act shall not apply to any contract to which section seven of the Sale of Goods Act, 1898 (which avoids contracts or the sale of specific goods which perish before the risk has passed to the buyer), applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

4. Discharge by performance.—The question whether or not a contract has been performed depends in each case on its express or implied terms. Partial performance will be dealt with later; the only questions that will be considered here are Payment and Tender.

*Payment.*—An obligation to pay a sum of money is discharged by payment of the sum due, by the debtor or his agent,



to the creditor, or to an agent of the creditor who has authority to receive it (k).

Payment made on behalf of the debtor by a third person does not discharge the debtor (l) unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification (m); but payment by a surety for the debtor in pursuance of his legal obligation discharges the debtor, and entitles the surety to stand in the place of the creditor (n).

Payment does not necessarily require the transfer of money; it may be effected by a settlement of accounts (o).

Payment, in order to discharge the debtor, must be of the whole amount due; the mere payment of a smaller sum cannot of itself amount to a discharge (p). But a debtor may be discharged if, by a new agreement between himself and the creditor, the creditor accepts something other than money which amounts to a "new and different benefit" (q). Thus he may be discharged if the creditor, in lieu of payment, accepts a negotiable instrument (r).

If, however, a debtor sends to his creditor a cheque for a smaller sum than is claimed, stating that it is "in full of all demands", and the cheque is retained by the creditor, it is a question of fact as to the terms on which it is so kept; and if the creditor, though he keeps the cheque, intimates that he

(k) *Fyles v. Ellis*, 4 Bing. 112; 5 L. J. C. P. 110; *Catterall v. Hindle*, L. R. 2 C. P. 186; 35 L. J. C. P. 161; 148 R. R. 781. Payment in an action to the plaintiff's solicitor is equivalent to payment to the plaintiff, but not payment to an agent or clerk of the solicitor, unless he has authority to receive it: *Yates v. Freckleton*, 2 Dougl. 628; *Perry v. Turner*, 1 L. J. Ex. 18.

(l) *James v. Isaacs*, 12 C. B. 791; 22 L. J. C. P. 73.

(m) *Simpson v. Egginton*, 10 Ex., at p. 845; 24 L. J. Ex. 312; 102 R. R. 867; *Smith v. Cox*, [1940] 2 K. B. 558; 109 L. J. K. B. 732.

(n) *Post*, Part III, Chapter III.

(o) *Spargo's Case*, L. R. 8 Ch., at p. 414; 42 L. J. Ch. 488. See also *Eyles v. Ellis* (*ubi supra*), where the debtor and creditor banked at the same bank and payment was by a transference from the debtor's account to the creditor's account.

(p) *Pinnel's Case* (1602), 5 Rep. 112 a: affirmed with a review of all the intermediate authorities in *Foakes v. Beer*, 9 A. C. 605; 54 L. J. Q. B. 130.

(q) See *Bidder v. Bridges*, 37 Ch. D., at p. 117; 57 L. J. Ch. 300; 58 L. T. 656. Such an agreement, if made, after the proper date of payment, operates, strictly speaking, as an "accord and satisfaction": *Société des Hôtels le Touquet Paris Plage v. Cummings*, [1922] 1 K. B., at p. 459; 91 L. J. K. B. 288.

(r) *Sibree v. Tripp*, 15 M. & W. 23; 15 L. J. Ex. 318; 71 R. R. 545; *Curler v. Clark*, 3 Ex. 375; 18 L. J. Ex. 114; *Bidder v. Bridges* (*ubi supra*). See also *Goddard v. O'Brien*, 9 Q. B. D. 37, which was, however, questioned in *Harachand Punamchand v. Temple* (*infra*).

takes it merely on account, he can sue for the balance of the debt (s).

But if a *third person* gives a consideration for the discharge of the debtor, it does not matter what proportion it bears to the debt. Where, therefore, a cheque for an amount smaller than the debt is sent by a *third person* in full settlement of the debt, and is retained by the creditor, he must be taken to have accepted the amount upon the terms upon which it is offered, and he cannot subsequently sue the debtor for the balance (t).

And since the Court will not inquire into the adequacy of the consideration for an agreement (u), the debtor may be discharged by an agreement under which the creditor, in whole or part satisfaction of the debt, accepts some chattel of less value, such as "a horse, hawk or robe", or under which he gets any additional advantage, however small, such as payment at an earlier day or at a different place (w); and payment of a sum smaller than a debt amounts to a discharge when made in compromise of a disputed liability (x).

A composition between a debtor and his creditors, whereby each creditor agrees to accept a proportionate part of his debt, is valid at Common Law, the debtor being discharged by the substitution of a new agreement, and the consideration to each creditor for that new agreement being, not merely the promise by the debtor to pay part of the debt, but also the forbearance of the other creditors, *who are parties to the agreement*, to insist upon their full claims (y). Now, however, such arrangements are governed by statute (z).

*Mode and place of payment.*—The ordinary Common Law rule is that a debtor must seek out his creditor and pay him at his

(s) *Day v. McLea*, 22 Q. B. D. 610; 58 L. J. Q. B. 293; and see *Ackroyd v. Smithies*, 54 L. T. 130.

(t) *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330; 80 L. J. K. B. 1155. (u) *Ante*, p. 46.

(w) *Pinnel's Case* (*ubi supra*), cited in *Foakes v. Beer* (*ubi supra*).

(x) *Ante*, p. 50; and see *Cooper v. Parker*, 15 C. B. 822; 24 L. J. C. P. 68; 100 R. R. 586.

(y) *Good v. Cheesman*, 2 B. & Ad. 335; 9 L. J. K. B. 231; 36 R. R. 574; explained by *Slater v. Jones*, L. R. 8 Ex., at p. 193; 42 L. J. Ex. 122; and see also *West Yorkshire, etc., Agency, Ltd. v. Coleridge*, [1911] 2 K. B. 326; 80 L. J. K. B. 1122.

(z) Under the Bankruptcy Act, 1914, a debtor against whom a receiving order is made may, either before (s. 16) or after (s. 21) adjudication, submit a proposal for a composition which, if accepted by a majority in number and three-fourths in value of the creditors who have proved, and approved by the Court, is binding on all creditors whose debts are provable. Private arrangements with creditors are governed by the Deeds of Arrangement Act of 1914, as modified by s. 22 of the Administration of Justice Act, 1925, and by the Rules of 1925, and must be registered within seven days of execution.

residence or place of business (a) in legal tender on the due date and without request (b).

If payment is made in any other way, as, e.g., through the post, the debtor is discharged only if the creditor has expressly requested payment to be made in that way, or such a request can be inferred (c).

Request need not be in express terms, and may be inferred from the previous course of dealing between the parties, but not from the mere fact that the debtor has been in the habit of making payment in some particular way and the creditor has not dissented (d).

In all cases, however, payment must be made in an ordinary and proper manner.

Thus, in *Mitchell-Henry v. Norwich Union Society* (e), A sent to B a written notice stating that a sum of £48, due from B to A, should be paid at A's office and asking B, "when remitting", to return the notice. B sent by registered post £48 in Treasury notes, which were stolen before they reached A. It was held (i) that the notice amounted to a request to send payment by post, but (ii) that to send so large a sum in Treasury notes was not an ordinary and reasonably proper way of making payment, and that B was not discharged.

**Payment by negotiable instrument.**—A negotiable instrument given as payment of a debt may be accepted in satisfaction and as a discharge of a debt (f), but is *prima facie* only a conditional payment, the condition being that the debt revives if the instrument is not duly met at the proper date (g).

During the currency of the instrument, the remedies of the creditor in respect of the debt are as a rule suspended (h), but if it is not duly met they revive unless it is outstanding in the

(a) *Rein v. Stein*, [1892] 1 Q. B., at p. 758; 61 L. J. Q. B. 401; *Drexel v. Drexel*, [1916] 1 Ch., at p. 260; 85 L. J. Ch. 235.

(b) See *Fowler v. Midland Electric Corporation, Ltd.*, [1917] 1 Ch. 656; 86 L. J. Ch. 472; 117 L. T. 97; 38 T. L. R. 822. Where, however, a customer of a bank has money to his credit on a current account, a demand for payment must be made by the customer before he can maintain an action: *Joachimson v. Swiss Bank*, [1921] 3 K. B. 110; 90 L. J. K. B. 973.

(c) See, e.g., *Edmundson v. Mayor of Longton*, 19 T. L. R. 15 (consumer of gas discharged by paying money in an automatic gas meter).

(d) *Pennington v. Crossley*, 77 L. T. 43.

(e) [1918] 2 K. B. 67; 87 L. J. K. B. 695.

(f) See *Maillard v. Argyll (Duke)* 6 Man. & G. 10; *Sayer v. Wagstaff*, 14 L. J. Ch. 116.

(g) *Currie v. Misa*, L. R. 10 Ex., at p. 163; 44 L. J. Ex. 94; *Felix Hadley & Co. v. Hadley*, [1898] 2 Ch. 680; 67 L. J. Ch. 694; 79 L. T. 209.

(h) *Simon v. Lloyd*, 2 Cr. M. & R. 187; 4 L. J. Ex. 195; *Gunn v. Dolckow, Vaughan & Co.*, L. R. 10 Ch. 491; 44 L. J. Ch. 732; 32 L. T. 781 (vendor's lien).

hands of a third party (i). But a negotiable instrument does not amount to a conditional payment or suspend the remedy of the creditor, where, if it did, the creditor would be deprived of a better remedy than an action on the instrument, as, e.g., where the debt is for rent, in which case the creditor would have a remedy by distress, or where the debt is secured and the creditor has a remedy under the security (j).

When a negotiable instrument is accepted as a conditional payment, and the condition is performed by actual payment, the payment relates back to the date when the instrument was given (k).

Payment may in some cases be inferred or presumed. Thus it may be inferred from mere lapse of time (l), and, in the case of periodical payments, the production of a receipt for one payment may raise an inference that the previous payments were made (m). A receipt is, however, only *prima facie* evidence of payment, and may be contradicted unless the person who gave it is estopped from denying its truth (n).

*Appropriation of payments.*—Where a debtor owes various sums for debts contracted at different dates and makes a payment which is not sufficient to discharge his whole liability, the question as to which debt is discharged is governed by the following rules:—

- i. The debtor may at the time of payment appropriate his payment to any of the debts; his appropriation need not be express, but may be inferred from the circumstances of the cases as known to both parties, as, e.g., where he pays the exact amount of one item (o). But a mere undisclosed intention in the mind of the debtor is not sufficient to support an appropriation (p).

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(i) *Price v. Price*, 16 M. & W. 232; 16 L. J. Ex. 99; 73 R. R. 476; *Davis v. Reilly*, [1898] 1 Q. B. 1; 66 L. J. Q. B. 844. In the case, however, of a cheque, the debtor may be discharged if it is not presented within a reasonable time (Bills of Exchange Act, 1882, s. 74, *post*, Part III. Chapter VI).

(j) *Henderson v. Arthur*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; *Re Defries & Sons, Ltd.*, [1909] 2 Ch. 428; 78 L. J. Ch. 720.

(k) *Felix Hadley & Co. v. Hadley* (*ubi supra*); and see *Marreco v. Richardson*, [1908] 2 K. B., at p. 593; 77 L. J. K. B. 859.

(l) *Cooper v. Turner*, 2 Stark. 497.

(m) On the sale of leasehold property the production by the vendor of the receipt for the last rent raises a presumption of law that all the covenants of the lease have been performed (s. 45 (2) of the Law of Property Act, 1925, re-enacting s. 3 of the Conveyancing Act, 1881).

(n) *Phillips v. Warren*, 14 M. & W. 379; 14 L. J. Ex. 280; *Bowles v. Foster*, 2 H. & N. 779; 27 L. J. Ex. 262; 115 R. R. 501; *Lee v. Lancashire and Yorkshire Ry.*, L. R. 6 Ch., at pp. 531, 536.

(o) *Marryat v. White*, 2 Stark. 101; *Parker v. Guinness*, 27 T. L. R. 129.

(p) *Leeson v. Leeson*, [1936] 2 K. B. 157; 105 L. J. K. B. 362.

- ii. If the debtor makes no appropriation, the creditor may appropriate the payment to any of the debts, even though barred by a Statute of Limitations (q), and his appropriation may be made at any time before judgment, even while he is actually in the witness-box (r).
- iii. If in the case of a *current and unbroken account* (e.g., a banking account, or a current account for goods supplied and work done rendered periodically with a balance carried forward (s)) no appropriation is made by either debtor or creditor, the law considers that the payment is made in respect of the earliest debts (t).

The last rule is not an invariable rule of law, and may be excluded by the circumstances of the particular case (u); it does not apply as between trustee and *cestui que trust* (a).

*Tender.*—Tender is the offer by a promisor to perform his obligation: it must be made at a reasonable time, and, if any place for performance is fixed by the contract, at that place (y).

If the obligation of the promisor is to perform some act other than the payment of money, he is discharged by the mere tender of performance, and on the refusal of the promisee to accept it the contract is discharged by breach. If his obligation is to pay a liquidated sum of money, the tender of payment does not discharge him, but bars any claim for further interest (a), and can be pleaded as a defence to any subsequent action for the debt.

By the plea of tender the defendant admits his liability to the extent of the amount tendered, but sets up that he has always been ready and willing to pay, and that he has performed his obligation as far as he could, complete performance having been prevented by the plaintiff's refusal to accept, and, since the tender does not discharge the debt, that he is still ready and willing to pay; he must therefore, with his defence, pay into Court the sum alleged to have been tendered, and, if he proves

(q) *Mills v. Forkes*, 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750.

(r) *Friend v. Young*, [1897] 2 Ch., at p. 437; 66 L. J. Ch. 737; 77 L. T. 50; *Seymour v. Pickett*, [1905] 1 K. B. 715; 74 L. J. K. B. 413 (appropriation by creditor when in witness-box held valid).

(s) See *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K. B., at p. 319; 97 L. J. K. B. 25.

(t) *Clayton's Case*, 1 Mer. 585; 15 R. R. 561; *The Mecca* (*infra*); *Deeley v. Lloyds Bank, Ltd.*, [1912] A. C. 756; 81 L. J. Ch. 697.

(u) *The Mecca*, [1897] A. C. 286; 66 L. J. P. 86.

(v) *Re Hallett's Estate*, 13 Ch. D. 696; 49 L. J. Ch. 415.

(y) *Startup v. Macdonald*, 6 Man. & G. 593; 12 L. J. C. P. 417; 64 R. R. 810.

(a) *Graham v. Seal*, 88 L. J. Ch. 31; 119 L. T. 526.

a valid tender of the whole amount due, he will succeed in the action and will be entitled to recover judgment for his costs (b).

But the essence of the plea is the continued readiness of the debtor to pay. If, therefore, after refusing tender, the creditor makes a subsequent demand which is refused by the debtor, the plea of tender fails (c).

The plea of tender cannot, however, be raised in an action for *unliquidated damages* (d).

A tender of payment must satisfy the following conditions:—

i. It must be in *légál tender*. At Common Law it must be made in current coin of the realm (e), but by statute it may be made by Bank of England notes (f).

Although, however, a creditor has a legal right to notes or cash, a tender made in some other form, *e.g.*, by cheque, is good if the creditor has expressly waived his right, *e.g.*, by asking for a cheque (g), or has made no objection to the tender on the ground of its form (h).

ii. It must be before action (i).

iii. It must be by the debtor (k), or someone on his behalf, to the creditor, or a person having actual or apparent authority to receive it (l).

A tender to one of several joint creditors or by one of several joint debtors operates as a tender to or by all (m).

iv. It must be of the exact sum due, but a tender of a larger sum is valid if no change is required (n) or if no objection is made on the ground of change being required (o).

(b) See the Annual Practice, Order XXII and notes thereon.

(c) *Hayward v. Hague*, 4 Esp. 98; *Spybey v. Hide*, 1 Camp. 181.

(d) *Davys v. Richardson*, 21 Q. B. D. 202; 57 L. J. Q. B. 409.

(e) *Polglass v. Oliver*, 2 C. & J. 15; 1 L. J. Ex. 5.

(f) By the Currency and Bank Notes Act, 1928, s. 1, amending the Bank of England Act, 1833, Bank of England notes are legal tender for any amount. By s. 4 of the Act of 1928 provisions were made for transferring to the Bank and calling in the Treasury notes issued under the Currency and Bank Notes Act, 1914. By the Coinage Act, 1870, s. 4, coins issued by the Mint, and not called in by Royal Proclamation, and of legal weight, are valid tender (a) in gold for any amount, (b) in silver up to 40s., and (c) in bronze up to 1s. By the Coinage Act, 1946, cupro-nickel coins are valid up to 40s.

(g) *Cubitt v. Gamble*, 35 T. T. R. 223.

(h) *Polglass v. Oliver* (*ubi supra*); *Jones v. Arthur*, 8 Dowl. 412; 59 L. R. 833.

(i) See *Driggs v. Calverly*, 8 T. R. 629.

(k) *Read v. Goldring*, 2 M. & S. 86; 14 R. R. 594.

(l) See *Finch v. Boning*, 4 C. P. D. 113 (reviewing earlier authorities).

(m) *Bullen & Leake's Pleadings* (3rd ed.), p. 691; *Douglas v. Patrick*, 3 T. R. 683; 1 R. R. 793.

(n) *Robinson v. Cook*, 6 Taunt. 336; 16 R. R. 624; *Dean v. James*, 4 B. & Ad. 547; 2 L. J. K. B. 91.

(o) *Saunders v. Graham*, Cow 121.

v. The money must be actually produced unless the creditor expressly or by conduct dispenses with production (p).

vi. The tender must be unconditional, so that if the creditor takes the money and more is in fact due, he may bring an action for the residue. It is therefore valid if offered by the debtor simply as being all that he admits to be due; but is invalid if offered upon the terms that the creditor is to admit that no more is due and to accept it in full settlement of his claims (q). A tender is not, however, invalid merely because it is made under protest (r). Nor is a tender invalid merely because the debtor asks for a receipt (s), though it may be invalid if it is made subject to the condition of getting a receipt (t).

*Set-off.*—If A owes B a debt of £100 and B also owes to A a debt of £100, these debts do not automatically discharge each other, though A and B may make a settlement of accounts by agreeing that they shall be set off against each other, such an agreement being equivalent to payment by each (u). But in an action brought by A against B it is possible for B to set up as a defence a claim to set off against his liability to A the debt due to himself from A.

At Common Law a defendant had in general no such right, and was compelled to bring a cross-action in order to recover any debt due to him from the plaintiff (x). By the Statutes of Set-off (y), it was, however, provided that where there were mutual debts between a plaintiff and a defendant, one debt might be set off against the other. This principle was extended by the *Judicature Act*, 1873 (z), and it is now possible for a defendant to set up by his pleading either a set-off or a counterclaim.

(p) *Finch v. Brook*, 1 Bing. N. C. 253; 4 L. J. C. P. 1; 41 R. R. 595.

(q) *Mitchell v. King*, 6 C. & P. 237; 40 R. R. 810; *Hastings (Marquis) v. Thorley*, 8 C. & P. 573; *Bowen v. Owen*, 11 Q. B. 130; 17 L. J. Q. B. 5.

(r) *Scott v. Urbridge, etc., Ry.*, L. R. 1 C. P. 596; 35 L. J. C. P. 293; *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1; 61 L. J. Ch. 59.

(s) *Jones v. Arthur*, 8 Dowl. 112; 59 R. R. 883.

(t) *Laing v. Meader*, 1 C. & P. 237. But by the Stamp Act, 1891, s. 103, if the amount exceeds £2, the creditor is liable to a penalty of £10 if he refuses to give a duly stamped receipt.

(u) *Ishbu v. James*, 11 M. & W. 512; 12 L. J. Ex. 295; and see *ante*, p. 70.

(x) A defendant might, however, in some cases set up as against the plaintiff a claim arising out of the same transaction. Thus, in an action for the price of goods, he might, in reduction of the price, set up a claim for damages for breach of warranty: see *Street v. Blay*, 2 B. & Ad. 156; 36 R. R. 626.

(y) 2 Geo. 2, c. 22; 6 Geo. 2, c. 21, repealed by the Statute Law Revision Act, 1879 and 1893.

(z) S. 21 (3).

A set-off can be pleaded only where (i) the claims on both sides are for liquidated debts, and (ii) due from and to the same parties in the same right, and (iii) the debt which the defendant claims to set off was due and enforceable by action at the date of the writ. A set-off is merely a defence; if it is less than the plaintiff's claim the plaintiff will get judgment for the balance; if it equals the plaintiff's claim the defendant will get judgment; but if the defendant's claim exceeds that of the plaintiff he cannot obtain judgment for the excess.

If, however, the defendant's cross-claim exceeds the claim of the plaintiff he can recover the excess by pleading it as a counterclaim instead of as a set-off. And he may also set up as a counterclaim any kind of cross-claim, as, e.g., a claim for unliquidated damages, or a claim which is not even of the same nature as the plaintiff's claim: thus a claim founded on tort may be raised as a counterclaim in an action of contract.

But a counterclaim is merely a cross-action which is tried at the same time as the main action. Thus there are as a rule two judgments, one on the claim and one on the counterclaim. The Court may, however, if it thinks fit, merely give judgment for the balance due to the plaintiff or the defendant (a).

#### 5. Discharge by Breach.—This may occur

- (i) by repudiation of the contract by the promisor or by conduct on his part rendering performance impossible, and
- (ii) by failure of the promisor to perform it.

*Repudiation and impossibility created by the promisor.*—If, when the time for performance of a contract arrives or during the time for its performance, the promisor refuses to perform it, or disables himself from performing it, the promisee is discharged from any further obligations resting upon him, unless they arise under independent covenants, and may maintain an action (i) upon a *quantum meruit* for anything done by him under the contract, and (ii) if he himself was ready and willing to complete his part of the contract, for damages for its breach. Thus—

*In General Billposting Co. v. Atkinson (b)*, A was employed by B under an agreement which contained a covenant by him restraining his right to trade after its termination. A having been wrongfully dismissed, it was held that his covenant not to trade was

(a) See, generally, as to set-off and counterclaim, Annual Practice, Order XIX, r. 8, Order XXI, r. 17, and notes thereon.

(b) [1909] A. C. 118; 78 L. J. Ch. 77.



not an independent covenant but ancillary to the contract of service, on the repudiation of which he was discharged from any further performance of it on his part.

In *Planché v. Colburn* (c), the defendant employed the plaintiff to write a treatise for a publication called "The Juvenile Library". After the plaintiff had completed a considerable part of the work the defendant abandoned the publication. *Held*, that the plaintiff could sue upon a *quantum meruit* for the value of the work which he had done.

In *Carl v. Ambergate, etc., Ry.* (d) A having contracted to purchase goods to be manufactured and supplied from time to time, and having accepted part of the goods, gave notice to the vendor not to manufacture any more as he would not accept them or pay for them. *Held*, that the vendor, being ready and willing to perform his part of the contract might maintain an action for damages.

Where, *before* the time for performance of a contract arrives, the promisor "so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up" (e).

(a) He may at once treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Thus, in *Hochster v. De La Tour* (f), A in April engaged B as a courier for the month of June, but in May wrote to B that his services would not be required. *Held*, that B need not wait until June before bringing his action for breach of contract.

So also, in *Frost v. Knight* (g), where A promised that on the death of his father he would marry B, but during the life of his father announced his intention of not fulfilling his promise and broke off the engagement, it was held that B could maintain an action at once.

(b) Alternatively he may insist on holding the other party to the bargain. But in that case he keeps the contract alive for the benefit of the other party as well as himself; he remains liable to all his own obligations under it; and enables the other

(c) 8 Bing. 14; 5 C. & P. 58; 1 L. J. C. P. 7.

(d) 17 Q. B. 127; 20 L. J. Q. B. 460.

(e) *Heyman v. Darwins, Ltd.*, [1912] A. C., at p. 861; 111 L. J. K. B. 241; see also *Frost v. Knight*, L. R. 7 Ex. 111, at pp. 112, 118; 41 L. J. Ex. 73.

(f) 2 B. & B. 678; 22 L. J. Q. B. 155.

(g) *Ubi supra*.

party not only to complete the contract, notwithstanding his previous repudiation, but to take advantage of any supervening circumstance which would justify him in refusing to complete it, as, *e.g.*, of an outbreak of war rendering its performance illegal (*h*).

But in the case of a contract containing various stipulations, as, *e.g.*, in a lease, the repudiation merely of one term does not entitle the promisee to rescind, unless the term is a condition of the contract or the repudiation goes to the root of the whole contract (*i*).

Where no time is fixed for the performance of a contract the inference is that it is to be performed in a reasonable time (*k*), and if either party fails to perform his part within a reasonable time the other party may by notice terminate the contract (*l*), and where there has been an "inordinate lapse of time" during which neither party has performed or required performance of the contract, the inference may be drawn that the parties have mutually abandoned the contract (*m*).

*Discharge by non-performance.*—Here, if the contract is wholly unperformed by the promisor, the promisee is released from any promises on his part which form the consideration for the promise of the other party, and may also maintain an action for breach of contract. Many difficulties, however, arise in case of a *partial non-performance* and a *partial breach*. Here the general rule is that a mere partial non-performance or partial breach, though it always entitles the other party to damages, does not entitle him to rescind the contract, unless it is so substantial as to strike at the root of the whole contract. There are, however, three classes of cases which must be distinguished :—

*A. Partial performance of entire contracts.*—Where a contract is *entire*, *i.e.*, a contract to do specific work for one specific sum, the promisor cannot as a general rule recover *any* payment if he fails to complete it or to fulfil an essential term or a condition of the contract (*n*).

Thus, in *Cutter v. Powell* (*o*), the plaintiff was hired to act as second mate for a payment of thirty guineas, provided that he

(*h*) *Avery v. Bourden*, 26 L. J. Q. B. 3; 5 E. & B. 714.

(*i*) *Johnstone v. Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 163.

(*k*) *Scott v. Ebury* (Lord), L. R. 2 C. P., at p. 269; 36 L. J. P. C. 161.

(*l*) *Jones v. Gibbons*, 8 Ex. 920; 22 L. J. Ex. 347; 91 R. R. 841.

(*m*) *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K. B. 78; 88 L. J. K. B. 131.

(*n*) *Vigers v. Cook*, [1919] 2 K. B. 475; 85 L. J. K. B. 1132; *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K. B. 423; 101 L. J. K. B. 215.

(*o*) 6 T. R. 320; 3 R. R. 135.

"proceeded, continued and did his duty as second mate on the ship from Jamaica to Liverpool": he died a few days before reaching Liverpool. *Held*, that his executrix could recover no part of the thirty guineas.

Similarly, in *Sinclair v. Bowles* (p), the plaintiff contracted to repair and make perfect three chandeliers. The jury found that the work had not been substantially completed. *Held*, that the plaintiff was not entitled to recover anything for the work which he had done.

But if a contractor substantially completes the work which he has contracted to do, this rule does not disentitle him to recover the price merely because some portions are insufficiently or badly done, though in such a case the other party is entitled to deduct such an amount as would be required to complete the work according to the contract (q). The rule, moreover, applies only to entire contracts, not to those which are divisible (r).

And in two cases the rule is excluded to the extent of allowing the promisor to recover on a *quantum meruit*, i.e., for the value of the work actually done. These cases are (s):—

- i. Where it was through the fault of the other party that the work was incomplete (t).
- ii. Where, though he himself has abandoned or failed to complete the work, there is something to justify the inference of a new contract to pay for what was done (u). But such an inference will not arise merely from the fact that the other party has accepted the benefit of the work done, unless the circumstances were such as to give him the option of refusing or accepting it.

Thus, in *Appleby v. Myers* (u), A contracted to erect machinery on B's premises, the total price to be paid on completion. When much of the machinery was erected, but before it was complete, the whole of the premises with the machinery was destroyed by fire. *Held* that, although on the principle of *Taylor v. Caldwell* (ante, p. 208) A was excused from further performance, he could not recover upon a *quantum meruit* for the work done by him.

So, also, in *Sumpter v. Hedges* (x), A having contracted to erect buildings on B's land, left them unfinished: and they were completed by B, who used some of the materials left on the land by A.

(p) 9 D. & C. 92; 7 L. J. K. B. 178; 32 R. R. 589.

(q) *Dakin & Co. v. Lee*, [1916] 1 K. B. 506; 84 L. J. K. B. 2031. As to the headnote in this case, see *Vigers v. Cook*, [1919] 2 K. B., at p. 481.

(r) *Mavor v. Pyne*, 3 Bing. 228; 4 L. J. C. P. 36; 28 R. R. 625.

(s) *Forman v. Luddesdale*, [1900] A. C., at p. 202; 69 L. J. P. 44; *Appleby v. Myers*, L. R. 2 C. P., at p. 661; 36 L. J. C. P. 331.

(t) *Planché v. Colburn* (ante, p. 222).

(u) See *Appleby v. Myers*, L. R. 2 C. P., at pp. 659, 660; 36 L. J. C. P. 651, and cases there cited.

(x) [1898] 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378.

*Held*, that B's completion of the work raised no inference of a new contract to pay A for the work which he had done, although B must pay the value of the materials used by him.

**B. Divisible promises.**—Where a contract contains various stipulations by both parties, the failure by one party to perform any one stipulation in accordance with the contract does not entitle the other party to terminate the whole contract, unless the repudiation goes to the root or essence of the contract and amounts in substance to a repudiation of the whole contract or the stipulation is a condition of the contract (*y*).

**C. Breach of condition.**—As has been already stated, parties may expressly make some event a condition precedent or condition subsequent, so that on its occurrence some liability accrues or is discharged. But the condition of which we now have to speak is a *promissory* condition, the *breach* of which discharges a contract.

Every promise which forms one of the actual terms of a contract is either a condition or a warranty. A condition is a vital term the non-performance of which amounts to a substantial failure to perform the contract at all; a warranty is a term which is not so vital that a failure to perform it goes to the substance of the contract (*a*).

“The proper significance of the word [warranty] in the law of England is an agreement which refers to the subject-matter of a contract; but, not being an essential part of the contract, either intrinsically or by agreement, is collateral to the main purpose of such a contract” (*b*).

“Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance, and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract . . . . Later usage has consecrated the term ‘condition’ to

(*y*) *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73; *Mersey Steel and Iron Co. v. Naylor, Benson & Co.*, 9 A. C. 434; 53 L. J. Q. B. 407; *Guy-Pell v. Foster*, [1930] 2 Ch. 169; 99 L. J. Ch. 520; *Payzu, Ltd. v. Saunders* (*post*, p. 285); and as to the sale of goods, see s. 31 of the Sale of Goods Act, 1893. *post*, Part III, Chapter V.

(*a*) This distinction does not always apply to contracts of insurance.

(*b*) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C., at p. 422; 91 L. J. P. C. 210; 38 T. L. R. 836.

describe an obligation of the former class, and 'warranty' to describe an obligation of the latter class" (c).

Whether any term is a condition or a warranty depends, as a rule, upon the circumstances of the case, though the parties may in any case expressly provide that a term of the contract shall be a condition. But if after breach of a condition the other party does not take steps to terminate the contract, but continues to accept performance or otherwise to treat it as existing, he can henceforth only treat the condition as if it were a warranty, and is entitled only to recover damages (d).

## SECTION 2.—*Discharge of Rights of Action*

1. **Discharge by agreement.**—Rights of action arising from breach of contract may be discharged either by release under seal (e) or by accord and satisfaction.

"*Accord and satisfaction* is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself" (f). It was formerly thought that such consideration must be executed, i.e., must consist in the performance of some act by the party to be released. Now, however, it is settled that it may be executory, that is to say, may consist merely in a promise (g). "If . . . it can be shown that what a creditor accepts in satisfaction is merely his debtor's *promise*, and not the performance of that promise, the original cause of action is discharged from the date when the promise is made" (h).

2. **Discharge by Statutes of Limitation.**—The right of action arising from a breach of contract may also be lost by virtue of the provisions of the *Limitation Act*, 1989, which, with some amendments and exceptions, consolidates all the earlier statutes of limitation.

(c) *Wallis, Son & Wells v. Pratt and Haynes*, [1910] 2 K. B., at p. 1012, per Fletcher Moulton, L.J., whose dissenting judgment was approved by the House of Lords ([1911] A. C. 394; 80 L. J. K. B. 1058; 105 L. T. 146; 27 T. L. B. 431). In earlier cases the term "condition precedent" is sometimes applied to a promissory condition.

(d) See *Behn v. Buiness*, 3 B. & S., at p. 755; 32 L. J. Q. B. 204.

(e) *Goldham v. Edwards*, 17 C. B. 141; 104 R. R. 632.

(f) *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1983] 2 K. B., at p. 643; 102 L. J. K. B. 775.

(g) [1933] 2 K. B., at p. 644.

(h) *Morris v. Baron & Co.*, [1918] A. C., at p. 85; 87 L. J. K. B. 145; 118 L. T. 34. See also *Elton, etc., Co. v. Broadbent*, 89 L. J. K. B. 186.

A statute of limitation may completely extinguish a right or may merely bar a remedy in respect of a right. Thus, under the earlier statutes, the title of a dispossessed owner of land might be completely extinguished by the effluxion of time (i); a creditor, however, merely lost his right of action and not any rights which he could enforce without legal proceedings, such as a lien (k) or the right of appropriation in respect of payments made to him by his debtor (l), and in certain circumstances even his right of action might be revived; moreover, when merely the remedy and not the right was affected, the Courts would not take into consideration a statute of limitations unless it was pleaded by way of defence. These principles are preserved by the Act of 1939 so that, in the case of a contractual right, (i) only the remedy by action is barred at the end of the period of limitation and (ii) it may be revived by an acknowledgment or part payment, and (iii) it is barred only if the Act is pleaded (m).

The following are the principal provisions of the Act of 1939 with regard to actions of contract.

*Periods of Limitation of the Right of Action.*

The following six-year periods are fixed:—

1. In (a) actions founded on simple contract;
- (b) an action to enforce a recognisance;
- (c) an action to enforce an award, where the submission to arbitration is not under seal;
- (d) actions to recover any sum recoverable by virtue of any enactment (n) other than a penalty or forfeiture or sum by way of penalty or forfeiture—  
*six years from the date on which the cause of action accrued (s. 2 (1)).*

A cause of action accrues at the earliest date upon which an action can be brought (o), i.e., in an action for money payable for work done, as soon as the work is done (p). By s. 31 (7) special provisions are made with regard to (*inter alia*) actions for an account,

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(i) See *Re Atkinson & Horsell's Contract*, [1912] 2 Ch., at p. 9; 81 L. J. Ch. 588; *Taylor v. Umberrow*, [1938] 2 K. B. 16; 99 L. J. K. B. 313.

(k) *Higgins v. Scott*, 2 B. & Ad. 113; 9 L. J. K. B. 262; 36 R. R. 607.

(l) *Ante*, p. 217.

(m) R. S. C., Order XIX, r. 15.

(n) That is to say, an action to recover any sum of money due under a statutory provision, e.g., an action by a workman under s. 1 of the Truck Act, 1831, to recover so much of his wages as have not been actually paid in current coin, see *Pratt v. Cook, Son & Co., Ltd.*, [1938] 2 K. B. 51; [1939] 1 K. B. 364; 108 L. J. K. B. 91.

(o) See *Reeves v. Butcher*, [1891] 2 Q. B. 509; 60 L. J. Q. B. 619.

(p) See *Coburn v. Colledge*, [1897] 1 Q. B. 702; 66 L. J. Q. B. 462.

actions upon a judgment and actions for arrears of rent.

The terms "action" and "cause of action" include "arbitration" and "cause of arbitration" (g).

2. In an action for an account—

*six years from the date of the matter in respect of which the amount is claimed (ss. 2 (2), 31 (7)).*

3. In an action for arrears of interest on a judgment debt—

*six years from the date on which the interest became due (s. 2 (4)).*

4. In an action for arrears of rent—

*six years from the date on which they became due (ss. 17, 31 (7)).*

The following twelve-year periods are fixed:—

1. In an action upon a specialty—

*twelve years from the date when the cause of action accrued except in the case of any action for which a shorter period is prescribed by the Act (s. 2 (3)).*

The term "specialty" formerly included a debt recoverable under a statute, but no longer has that effect because of the provisions of s. 2 (1) (c) (*supra*) (r).

2. In an action upon a judgment—

*twelve years from the date on which the judgment became enforceable (ss. 2 (4), 31 (7)).*

But, as already noted, a six-year period applies to arrears of interest on a judgment.

None of the foregoing provisions of s. 2 apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provisions thereof may be applied by the Court by analogy in the same manner as the previous statutes were applied (s. 2 (7)). And, by s. 29 nothing in the Act affects any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

Before the Judicature Act, 1878, a Court of Equity might act either in obedience to a statute of limitations or by analogy to a statute of limitations. If proceedings

(g) *Pegler v. Railway Executive*, [1948] A. C. 332; [1948] L. J. R. 989.

(r) *Leaver v. Barber, Walker & Co.*, [1943] 1 K. B., at p. 398.

in equity were barred by the express words of a statute, then a Court of Equity was bound to act in obedience to the statute. And, even in the absence of such an express bar, where, as in the case of a claim for an account, there was a remedy at law and a corresponding remedy in equity which was extended to persons who would not have a remedy at law, *e.g.*, a person seeking to enforce an equitable debt, then a Court of Equity acted by analogy to a statute barring the remedy at law (s). After the Judicature Act, 1873, these principles continued to govern the grant of equitable relief in any branch of the Supreme Court. But the grant of all equitable relief was, and still is, discretionary, so that it may be refused to a plaintiff who has been guilty of acquiescence or laches, and this principle is preserved by s. 29 of the present Act (*supra*).

*Disabilities.*—By s. 22 it is provided that if *on the date when any of the foregoing rights of action accrued* the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.

But (a) this section does not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims;

(b) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person. And it must be noted that the section applies only to disability when the right of action accrued and not to any subsequent disability.

By s. 31 (2) it is provided that, for the purposes of the Act, a person shall be deemed to be under a disability while he is an infant, or of unsound mind, or a convict subject to the operation of the Forfeiture Act, 1870, in whose case no administrator or curator has been appointed under that Act. And by s. 31 (3) it is further provided that for the purposes of the preceding

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(s) See *Knor v. Gye*, L. R. 5 H. L., at p. 674; 42 L. J. Ch. 234; *Friend v. Young*, [1897] 2 Ch. 421; 66 L. J. Ch. 737.



subsection a person shall be conclusively presumed to be of unsound mind -

- (a) while he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics, or is receiving treatment as a voluntary patient under the Mental Treatment Act, 1980, being treatment which follows without any interval such detention as aforesaid; and
- (b) while he is detained under any provision of the Mental Deficiency Acts, 1913 to 1938.

*Acknowledgment and part payment.*—By s. 23 (4) it is provided that where any right of action has accrued to recover any debt or other liquidated pecuniary claim and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment :

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

By s. 24 any such acknowledgment must be in writing and signed by the person making it. It may be made *by* an agent and *to* the person whose claim is being acknowledged or in respect of whose claim the payment is being made or to his agent.

These provisions as to acknowledgment and part payment have altered the previous law with regard to the rights of action on a simple contract debt, which formerly could be kept alive or revived only by an express promise in writing to pay the debt or by an acknowledgment or part payment of the debt in such language or such circumstances that a promise to pay the debt or the balance could be inferred (*f*)

By s. 25 (5) an acknowledgment of any debt or other liquidated pecuniary claim binds the acknowledgor and his successors but not any other person. By s. 25 (8) the term "successors" means the personal representatives of the acknowledgor and any other person on whom the liability in respect of the debt or claim devolves, whether on death or bankruptcy . . . or otherwise. By s. 25 (6) a payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons

(f) See *Spencer v. Hemmings*, [1922] 2 A. C. 307; 91 L. J. K. B. 941 (acknowledgment), *Foster v. Daubert*, 6 Ex., at p. 853; 20 L. J. Ex. 385; *Re Somerset* [1911] 1 Ch., at p. 268; 63 L. J. Ch. 41 (part payment).

liable in respect thereof. Thus a payment by a principal debtor will bind sureties.

*Fraud and mistake.*

By s. 26 it is provided that

where, in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
- (b) the right of action is concealed by the fraud of any such person as aforesaid, or
- (c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it :

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed, or
- (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

The term "fraud" in this section does not include fraudulent conversion of goods; in civil actions the term "fraudulent" as applied to conversion is nothing more than an abusive epithet (u).

*Miscellaneous provisions.*—The Act also provides :—

- (1) That this Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions in the High Court (s. 27 (1)).
- (2) That, notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, the cause of action shall, for the purpose of this Act and of any other such enactment (whether in their application

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(u) *Beaman v. A.R.T.S., Ltd.* [1919] 1 K. B., at p. 558.

to arbitrations or to other proceedings), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

- (3) That for the purpose of this Act and of any such enactment as aforesaid, an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated (s. 27 (3)).
- (4) That for the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded (s. 28).
- (5) That this Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by any other enactment (s. 32).
- (6) That nothing in this Act shall—
  - (a) enable any action to be brought which was barred before the commencement of this Act by an enactment repealed by this Act, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Act; or
  - (b) affect any action or arbitration commenced before the commencement of this Act (s. 33).

**Money lent by moneylenders.**—By s. 13 of the *Moneylenders Act, 1927*, proceedings by a moneylender for the recovery of money lent by him after the commencement of the Act, or for the enforcement of any agreement made or security taken after the commencement of the Act in respect of any loan by him, must in general be commenced before the expiration of twelve months from the accrual of the cause of action; but—

- (a) If during the period of twelve months or any subsequent period during which, under this section, proceedings may

be brought, the debtor gives a written acknowledgment of the amount due and a written undertaking to pay it, proceedings may be brought within twelve months from the date when it was given;

- (b) Time will not begin to run in respect of payments from time to time becoming due under a contract for the loan of money until a cause of action accrues in respect of the last of such payments;
- (c) If at the date on which the cause of action accrues or any such acknowledgment and undertaking is given the person entitled to take proceedings is *non compos mentis*, time will not begin to run until he either becomes of sound mind or dies.

### SECTION 3.—*Survival of Right of Action*

At Common Law a right of action for breach of contract survived to the personal representatives of a deceased person unless the claim was for damages which would have been given to him in his lifetime only as compensation for a personal wrong (*w*). Thus, the right to bring an action for breach of promise to marry the deceased did not survive to the personal representatives unless the deceased thereby suffered some pecuniary loss or damage (*x*).

A right of action for breach of contract survived in general at Common Law *against* the personal representatives whether the injury caused thereby was a personal injury or an injury to property (*w*). An exception, however, exists in case of actions for breach of promise of marriage, which could do so only where the breach has caused some special damage to the estate of the plaintiff (*y*).

Now, however, by s. 1 of the *Law Reform (Miscellaneous Provisions) Act, 1934*, all causes of action for breach of contract which are vested in or subsist against a person at the date of the death survive for the benefit of or against his estate.

But, where a cause of action for a breach of promise to marry so survives for the benefit of the estate of a deceased person, the damages are limited to such damage to his estate as flows from the breach.

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(*w*) See *Quirk v. Thomas*, [1916] 1 K. D., at p. 530; 65 L. J. K. B. 519.

(*x*) *Chamberlain v. Williamson*, 2 M. & S. 108; 15 R. R. 295.

(*y*) *Finlay v. Chirney*, 20 Q. B. D. 194; 57 L. J. Q. B. 247; *Quirk v. Thomas* (*ubi supra*).

## CHAPTER VII

## REMEDIES FOR BREACH OF CONTRACT

SECTION 1.—*Common Law Remedies*

THE Common Law remedies for breach of contract were the actions for debt and for damages.

Debt was an action for liquidated (*i.e.*, ascertained) amount, whereas an action for damages was an action for an amount to be assessed as compensation to the plaintiff for the breach by the defendant of a contract with respect to the performance of some act other than payment of money. The distinction is still of importance for some purposes, and is illustrated by ss. 49-51 of the *Sale of Goods Act*, 1893, which distinguish between an action for the *price* of goods sold and an action for *damages* for breach of contract (*a*).

Interest upon a debt is recoverable only by statute or by contract (*b*), either express or inferred from the course of dealing between the parties (*c*).

But, by s. 3 of the *Law Reform (Miscellaneous Provisions) Act*, 1931, it is provided that in any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment :

Provided that nothing in this section

- (a) shall authorise the giving of interest upon interest ;
- (b) shall apply to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise ;
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange (*d*).

(a) *Test*, Part III, Chapter V.

(b) *Re Gough*, 17 Ch. D. 1, p. 772; 50 L. J. Ch. 621.

(c) *Le Marquis et Co. v. Cey* (1901) 2 Ch. 548; 70 L. J. Ch. 810.

(d) *Test*, Part III, Chapter VI.

A judgment of the High Court carries interest at 4 per cent. from its date, both on the judgment and on the costs (e). A county court judgment does not carry interest (f).

**Damages.**—The general rule for the assessment of damages for breach of contract is that “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed” (g).

“The fundamental basis is thus compensation for pecuniary loss . . . but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps” (h). Thus, where a person who has contracted to purchase goods is notified by the vendor that he cannot deliver the goods at the proper date and the market price of the goods is rising, the purchaser is not entitled to wait and watch the rising market until the proper date of delivery and then claim as damages the difference between the contract price and the then market price, but is bound to mitigate the loss by buying the goods elsewhere as soon as he can (i). So also, if a plaintiff could have mitigated his loss by accepting a reasonable offer from the defendant, he can only recover such loss as he would have incurred if he had accepted that offer.

Thus, in *Payzu, Ltd. v. Saunders* (k), the defendant agreed to sell goods to the plaintiff. Delivery was to be as required during nine months and payment was to be made for each instalment within one month after delivery, less  $2\frac{1}{2}$  per cent. discount. The plaintiff failed to make due payment for the first instalment and the

(e) Judgments Act, 1636, ss. 17, 18; Order XLII, rule 3; Order XLIII, rule 16. Interest on the costs runs from the date of the judgment, not the date of taxation. *Boswell v. Cook*, 57 L. J. Ch. 101.

(f) *R. v. Essex County Court Judge*, 18 Q. B. D. 701; 56 L. J. Q. B. 315; 57 L. T. 613.

(g) *Robinson v. Harman*, 1 Ex., at p. 655; *Watts & Co., Ltd. v. Mitsui, Ltd.*, [1917] A. C., at p. 211; 86 L. J. K. B. 873.

(h) *British Westinghouse Co., Ltd. v. Underground Railways of London, Ltd.*, [1912] A. C., at p. 689; 81 L. J. K. B. 1130; and see *Frost v. Knight*, L. R. 7 Ex., at p. 113.

(i) *Nickoll and Knight v. Ishon, Eldridge & Co.*, [1900] 2 Q. B., at p. 305; 69 L. J. Q. B. 610; 82 L. T. 761. See also *British Stamp, etc., Co. v. Haynes*, [1921] 1 K. B. 377; 90 L. J. K. B. 271. But a seller who delivers goods which are not in accordance with the contract cannot require the buyer to minimise the damage by passing on the goods to his sub-purchasers in a manner which would ruin his credit in the commercial world. *Finlay (James) & Co. v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1929] 1 K. B. 400; 98 L. J. K. B. 251; 140 L. T. 389.

(k) [1919] 2 K. B. 581; 89 L. J. K. B. 17.

defendant believing that the failure was due to the plaintiff's lack of means refused to deliver any more of the goods under the terms of the contract, but offered to deliver them at the contract price if the plaintiff paid cash for each instalment. *Held*, (i) that in the circumstances the failure of the plaintiff to pay for the first instalment did not amount to a repudiation of the contract or go to the root of the contract (l), and (ii) that the plaintiff ought to have mitigated his loss by accepting the offer of the defendant and could only recover such loss as he would have suffered if he had accepted it.

On the same principle a servant who is wrongfully dismissed must endeavour to mitigate the damages by obtaining other employment (m).

But to this general rule that the measure of damages is the pecuniary loss to the plaintiff there are three exceptions, in two of which a plaintiff may recover more than his pecuniary loss and in one of which he may recover less (n). These are :—

i. Actions against a banker for refusing to pay a customer's cheque when he has funds of the customer to meet it, or he has, for valuable consideration, agreed to allow the customer to overdraw to the amount of the cheque. If in any such case a banker dishonours a cheque drawn on him by his customer, having funds of his customer sufficient to meet it, he is liable to an action for damages, in which the customer, though he has sustained no pecuniary damage, may recover damages for injury to his credit (o). But, unless the customer is a trader, he will be entitled only to nominal damages (p).

ii. Actions for breach of promise of marriage. Here the damages are not limited to actual pecuniary loss, but the jury may take into consideration the injury to the plaintiff's feelings and any circumstances of aggravation occasioned by the conduct of the defendant (q), as, *e.g.*, the fact that the plaintiff has been seduced by the defendant (r).

iii. Actions against a vendor of real property who, without any fault on his part, fails to make title. If a vendor, acting in

(l) *Antt*, p. 225.

(m) *Grice v. Calder*, [1895] 2 Q. B. 253; 61 L. J. Q. B. 582; 72 L. T. 829.

(n) *Addis v. Gramophone Co., Ltd.*, [1909] A. C., at pp. 491, 495; 78 L. J. K. B. 1122; 101 L. T. 166. See also *Clayton (Herbert) and Jack Waller v. Olsner*, [1930] A. C., at p. 220; 99 L. J. K. B. 165.

(o) *Robt v. Stewart*, 11 C. B. 595; 23 L. J. C. P. 118.

(p) *Gibbons v. Westminster Bank, Ltd.*, [1939] 2 K. B. 882; 108 L. J. K. B. 481.

(q) *Smith v. Woodman*, 1 C. B. (N.S.) 660; *Finlay v. Chirney*, 20 Q. B. D. 491; 57 L. J. Q. B. 217.

(r) *Berry v. Da Costa*, L. R. 1 C. P. 331; 35 L. J. C. P. 191.

good faith and having done all that was within his power to complete the contract, is unable to complete owing to a defect in title, the purchaser is not entitled to any damages for loss of his bargain and can recover only his deposit (if any) with interest and his expenses incurred in investigating title and his proper conveyancing expenses in connection with the contract (s).

But, if a vendor refuses to complete or fails to take any steps necessary for completion, the purchaser may recover damages for loss of his bargain (t). And even if he cannot show any damage from loss of bargain, he is entitled to recover interest on any deposit paid by him and the costs of approving and executing the contract, investigating the title and preparing the conveyance and of searches (u).

*General and special damage.*—General damage is that damage “which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White* (w). In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's right and calls it *general damage*” (x). The term applies to all damage of a kind which can be presumed to flow, in the ordinary course of things, from the breach of a contract of the particular nature, though the amount may, according to the circumstances of the case, be either *nominal* (e.g., one shilling) (y) or *real*, and in the latter case may be either small or large (z).

The term *special damage*, on the other hand, is applicable to all injury or loss, beyond the general damage, which is not of such a kind that it would necessarily result in all contracts of the

(s) *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158; 43 L. J. Ex. 218; 31 L. T. 387; *Jones v. Gardiner*, [1902] 1 Ch. 191; 71 L. J. Ch. 93.

(t) *Day v. Singleton*, [1899] 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; *Jones v. Gardiner*, *ubi supra*; *Re Daniel*, [1917] 2 Ch. 405.

(u) *Wallington v. Townsend*, [1939] 1 Ch. 588; 108 L. J. Ch. 305.

(w) 2 Ld. Raym. 938.

(x) *Ratcliffe v. Evans*, [1892] 2 Q. B., at p. 526; 61 L. J. Q. B. 533; 66 L. T. 791. The wrongful refusal of an innkeeper to receive and lodge a traveller is the violation of such a right; *Constantine v. Imperial Hotels, Ltd.*, [1944] 1 K. B. 695; 114 L. J. K. B. 65.

(y) See *Sapwell v. Bass*, [1910] 2 K. B. 456; 79 L. J. K. B. 932; 102 L. T. 811; 26 T. L. R. 452. “Nominal damages” is a technical phrase which does not mean small damages, but means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed: *Mediana (Owners of Steamship) v. Comet (Owners of Lightship)*, [1900] A. C., at p. 116.

(z) See *Admiralty Commissioners v. S.S. Susquehanna*, [1926] A. C. 655; 95 L. J. P. 128.



particular nature, but which has in fact resulted in the *particular case* (a). Special damage must always be alleged with particulars by the plaintiff in his pleading (b).

Thus, in an action for breach of promise of marriage, damages for injury to the feelings of the plaintiff are general damages, which may vary according to the circumstances accompanying the breach; but any pecuniary loss is special damage, which must be expressly claimed (c). So also, in an action against a banker for dishonouring a cheque, the damages for loss of credit are general damages, which may be nominal (d) or real (e); but if the plaintiff claims that he has lost custom or credit from particular individuals, that is special damage and must be expressly alleged (f).

The assessment of damages is for the jury, and it is no defence that the calculation is difficult or that it depends upon contingencies (g). But with regard to special damage there may be a preliminary question, which is for the Judge (h), namely, whether or not the damages are too remote to be recoverable.

*Remoteness of damage.* - In an action for breach of contract special damages claimed by the plaintiff may, on two distinct grounds, be too remote to be recoverable from the defendant. These grounds are (1) that the damages are due to circumstances which are *extraneous to the contract*, and (2) that there is no sufficient *causal connection* between the breach of contract and the damages.

1. The rules which must be applied in considering the first ground of remoteness were settled in the case of *Hadley v. Baxendale* (i). Here the plaintiff, who was a mill-owner, delivered to the defendant, who was a carrier, a broken mill shaft to be carried to an engineer as a model for a new shaft. Delivery was delayed, the mill was in consequence stopped, and the plaintiff

(a) In connection with torts "special damage" has a third meaning: *post*, Part II, Introduction.

(b) *Ratcliffe v. Evans* (*ubi supra*); *Fleming v. Bank of New Zealand* (*ubi supra*).

(c) *Forley v. Chappoy*, 20 Q. B. D. 191; 57 L. J. Q. B. 217.

(d) *Morrell v. Williams*, 1 B. & Ad. 115; 9 L. J. K. B. 12; 35 R. R. 329.

(e) *See ante*, p. 237.

(f) *Fleming v. Bank of New Zealand* (*ubi supra*).

(g) *Chaplin v. Hicks*, 1911 1 K. B. 786; 80 L. J. K. B. 1292; 27 T. L. R. 58; *Admiralty Commissioners v. S.S. Susquehanna* (*ubi supra*).

(h) Where final judgment has been obtained, and the damages are merely a matter of calculation, they may be referred for assessment to one of the masters of the Court or to an official or special referee. Where damages are to be assessed in respect of a continuing cause of action, they are in all cases calculated down to the date of the assessment: R. S. C. Order XXXVI, r. 58.

(i) 9 Ex. 341; 31 L. J. Ex. 179.

brought an action for loss of profits through the stoppage. It was, however, held that he could not recover them because (i) such consequences would not ordinarily arise from delay in carrying a shaft, and (ii) he had not communicated to the defendant the special circumstances making these consequences possible. Two general rules were also laid down by the Court for determining the extent of a defendant's liability in an action for breach of contract :—

- (a) The defendant is always liable for such damages as may, fairly and reasonably be considered to have arisen “naturally, *i.e.*, according to the usual course of things”, from the breach.
- (b) The defendant is also liable for such further damages “as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach”.

These two rules are explained as follows, in the leading case and subsequent cases (k).

“A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract” (l).

Accordingly, in ordinary circumstances, the defendant is responsible only for ordinary consequences, and is liable only for such damages as are a probable result of the breach of a contract of the particular kind.

The same rule applies if, though special circumstances exist, they are not communicated to the defendant.

But, if the contract is made *on the basis* of special circumstances which may entail special consequences, the defendant is liable for such additional damages as may reasonably be supposed to have been in his contemplation as the probable result of a breach of the particular contract in the special circumstances.

Whether or not a defendant is liable for such additional damages depends in every case upon whether the situation was so disclosed to him by the plaintiff at the time of making the contract as to render it a fair inference of fact that the defendant intended

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(k) See, particularly, *Hammond v. Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58; 4 T. L. R. 95; *Patrick v. Russo-British, etc., Co.*, [1927] 2 K. B. 585; 97 L. J. K. B. 60; 137 L. T. 815; *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A. C. 452; 101 L. J. K. B. 417; *The Arpad*, [1931] P. 189; 103 L. J. P. 129 (reviewing the authorities).

(l) *Grébert Borgnis v. Nugent*, 15 Q. B. D., at p. 92; 54 L. J. Q. B. 511. See also *Clayton (Herbert) & Jack Waller v. Oliver*, [1930] A. C., at p. 220; 99 L. J. K. B. 165.

to contract with reference to the special circumstances and to be liable for a breach under those circumstances (*m*).

Thus, in ordinary circumstances, a carrier who does not deliver marketable goods within a reasonable time is liable only for the difference between the market price at the date of delivery and the date when they ought to have been delivered (*n*). And similarly, in ordinary circumstances a carrier who fails to deliver goods is liable only for the market value at the date of the non-delivery (*o*). But if a carrier accepts goods for delivery at a particular place and time, knowing the particular purpose for which the goods are sent, he is liable for any loss of profits caused by delay in delivery (*p*). And, if goods, though not sent for any particular purpose, have a profit-earning capacity, the carrier is liable for the profits lost by the delay (*q*).

So also, in an action against a vendor of goods for non-delivery or for breach of warranty of quality the defendant is, in ordinary circumstances, liable only for the difference between the contract price and the market price at the date of the breach (*r*), so that any sub-contract made by the purchaser will not be taken into account (*s*). But if to the knowledge of the vendor the contract was made in order to enable the purchaser to carry out some

(*m*) *Gribsert Borquis v. Nugent*, 15 Q. B. D., at pp. 89, 93; *Chaplin v. Hick*, [1911] 2 K. B., at p. 791; *Weld Blundell v. Stevens*, [1920] A. C., at p. 979; 89 L. J. K. B. 705; 123 L. T. 593; *Hall v. Pim (Junior) & Co.*, 139 L. T. 50. Knowledge of special circumstances is not in itself sufficient to render the defendant liable, but is evidence of an understanding by both parties that the contract is based upon the circumstances which are communicated: *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P., at p. 509; 87 L. J. C. P. 235.

(*n*) *Horne v. Midland Ry.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59; 28 L. T. 312.

(*o*) *The Arpad* (*ubi supra*). "Where there is no evidence of this other than the price which the plaintiff was able to obtain this value may be accepted as evidence of value at the date of the breach of the contract": *Id.*, at p. 218.

(*p*) *Sympton v. London and North Western Ry.*, 1 Q. B. D. 274; 45 L. J. Q. B. 182.

(*q*) *Sunley & Co., Ltd. v. Charnard White Star, Ltd.*, [1930] 2 K. B. 791; 109 L. J. K. B. 833.

(*r*) Sale of Goods Act, 1930, s. 51, 53 *post*, Part III, Chapter V. Where, however, the market price is not ascertainable, the price at which the buyer has resold the goods may, in the absence of any other evidence, be accepted as evidence of their value: *The Arpad*, [1931] P., at p. 210.

(*s*) *Rodocanachi v. Milner*, 15 Q. B. D. 67; 56 L. J. Q. B. 202; *Finlay James & Co. v. A. F. Kuik-Hoo Tong Harber Maatschappij*, [1929] 1 K. B. 400; 98 L. J. K. B. 251. This rule applies not only to prevent the damages from being increased, but also to prevent them from being decreased. Thus, where in an action for breach of warranty of quality the plaintiffs have accepted part of the goods complained of, and resold them at a price higher than the market price at the date of delivery, this cannot be taken into account in mitigation of damages: *Slater v. Hoyle & Smith, Ltd.*, [1920] 2 K. B. 11; 89 L. J. K. B. 491; 122 L. T. 611; 56 T. L. R. 132.

particular purpose, as *e.g.*, to fulfil an existing sub-contract of sale or one which in the ordinary course of business was sure to be made by the purchaser, he may be liable for damages caused by the failure of that purpose (t).

Similarly, where a carrier of passengers is guilty of unreasonable delay, a passenger may recover the amount of expenses reasonably incurred, such as hotel expenses or the cost of procuring a conveyance to continue his journey (u).

2. The second ground of remoteness depends upon the maxim *In jure non remota causa, sed proxima spectatur*, a principle which applies both to contracts and to torts (w).

In order to make the defendant responsible, the damages must be the "direct and natural" consequences of the breach (x), that is to say, there must be a "direct and natural causal sequence" (y) between the breach and the damages.

A defendant is not liable for damages which are connected with the breach merely by a series of independent causes (z). Thus, if a railway company upsets a passenger and breaks his leg, the damage is direct; if in breach of contract it takes him to the wrong station and, in order to get home, he takes a cab, which upsets him and breaks his leg, the damage is too remote, because, though the breach was a *causa sine qua non* of the damage, it was not the *causa causans* or proximate cause (a).

(t) *Hydraulic Engineering Co. v. McIlaffie*, 1 Q. B. D. 670; *Hammond v. Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58; *Dobell & Co. v. Barber and Gariatt*, [1931] 1 K. B. 219; 100 L. J. K. B. 65; *The Arpad*, [1934] P., at p. 201. The damages may in such a case include the cost of reasonably defending an action brought against the purchaser by the sub-purchaser (*Hammond v. Bussey*, *ubi supra*; *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413; 68 L. J. Q. B. 812; see also *Kasler and Cohen v. Slavovski*, [1928] 1 K. B. 78; 96 L. J. K. B. 850; 137 L. T. 641, where the principle was extended to a series of sub-sales).

(u) *Hamlin v. Great Northern Ry.*, 1 H. & N. 408; 26 L. J. Ex. 20; *Le Blanche v. London and North Western Ry.*, 1 C. P. D. 286; 31 L. T. 667.

(w) *Cobb v. Great Western Ry.*, [1893] 1 Q. B., at p. 464; 62 L. J. Q. B. 335; affirmed, [1894] A. C. 419; 63 L. J. Q. B. 629; *H.M.S. London*, [1914] P., at p. 77; 83 L. J. P. 74.

(x) *Cobb v. Great Western Ry.* (*ubi supra*). Various phrases that have been used to describe such consequences as are not too remote are collected in [1914] P., at p. 77.

(y) *Dulieu v. White & Sons*, [1901] 2 K. B., at p. 678; 70 L. J. K. B. 837.

(z) *Hobbs v. London and South Western Ry.*, L. R. 10 Q. B., at pp. 117, 118; 44 L. J. Q. B. 49.

(a) The illustrations in the text are taken from *Hobbs v. London and South Western Ry.* (*ubi supra*). A similar illustration is given in *Chaplin v. Hicks*, [1911] 2 K. B., at p. 791; 80 L. J. K. B. 1292. For the expressions *causa causans* and *causa sine qua non*, see *Burton v. Pinkerton*, L. R. 2 Ex., at p. 350; 36 L. J. Ex. 340; 17 L. T. 15; *Romney Marsh Dairies v. Trinity House Corporation*, L. R. 5 Ex., at p. 208; affirmed, L. R. 7 Ex. 217; 41 L. J. Ex. 106; *Farquharson Brothers v. King*, [1902] A. C., at p. 339; 71 L. J. K. B. 667; *Howard v. Odhams Press, Ltd.*, [1936] 1 K. B., at pp. 81, 85; 106 L. J. K. B. 675.

Conversely, however, the term "proximate cause" does not mean proximate in time but "proximate in efficiency" (b). Accordingly, if the breach produces a continuous effect, which is the "primary and substantial" cause of the damage, the defendant is responsible, although the immediate *causa sine qua non* was some intervening fact or even the act of a third person. Thus, in *De la Bere v. Pearson, Ltd.* (c) the defendants, who were proprietors of a newspaper, advertised, offering to give advice to investors. The plaintiff asked for advice and for the name of a good stockbroker. The defendants recommended an outside broker who, as the defendants might have found out by making reasonable inquiry, was an undischarged bankrupt. The plaintiff, relying on the recommendation, sent money to the outside broker, who misappropriated it. It was held (i) that there was a contract for good consideration, since the questions and answers relating to investments might, if the defendants chose, be published and the publication might increase the sale of the paper; (ii) that it was a term of the contract that the defendants should use reasonable care in recommending a stockbroker and that the defendants had committed a breach of contract; (iii) that the defendants were responsible for the loss caused to the plaintiff although it was occasioned by the intervening act of a third person.

*Penalties and liquidated damages.*—A contract may provide that, upon breach of some or any of its terms, the party in default shall pay a sum fixed by the contract. If that sum is really liquidated damages it becomes, on breach, a debt due from the defendant to the plaintiff and can be recovered in full; if, however, it is merely a penalty to secure the payment of money by the defendant, the plaintiff can recover only the sum which ought to have been paid, together with interest (d); and, if it is a penalty to secure performance of some act other than the payment of money, the plaintiff can recover only his actual damages, which will be assessed in the ordinary way (e).

(b) *England Steamship Co. v. North Union Fire Insurance Society*, [1918] A. C. 419, 290.

(c) [1907] 1 K. B. 483, 76 L. J. K. B. 609, affirmed, [1908] 1 K. B. 280; 77 L. J. K. B. 380.

(d) *Hopins v. Baxendale*, [1900] 2 C. 761; 69 L. J. Ch. 689; 83 L. T. 129. In the case of a contract to pay a sum of money the rule is statutory by 1 & 3 Anne, c. 16, s. 12, 13, 14, and it is not recoverable in excess of the principal sum of £100 and interest on the same, p. 709.

(e) *Hopins v. Baxendale* (supra). Bonds other than common bonds are governed by 8 & 9 Will. 3, c. 11, s. 8 (ante, p. 71), and though judgment may be entered for the whole sum, execution can be issued only for the assessed damages and costs. *Trust v. Dineen*, L. R. 8 Ex. 19; 42 L. J. Ex. 88; see also Order XIII, r. 14. Accordingly, if a sum fixed in a contract is a penalty,

In the case of *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (f), the following rules were settled for distinguishing a penalty from liquidated damages:—

1. Though parties who use the words “penalty” or “liquidated damages” may, *prima facie*, be supposed to mean what they say, yet the expression used is not conclusive; the Court must find out whether the payment is in truth a penalty or liquidated damages.

2. The essence of a penalty is a payment stipulated as a *terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

3. The question whether the sum is a penalty or liquidated damages is a question of *construction*, to be decided upon the terms and inherent circumstances of each particular contract judged of as at the time of making the contract.

4. To assist this task of construction, various tests have been suggested. Such are:—

- i. It will be held to be a penalty if the sum is extravagant in comparison with the greatest loss that could possibly follow the breach.
- ii. It will be held to be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is greater than the sum which ought to have been paid.
- iii. There is a presumption (but no more) that it is a penalty when a single lump sum is made payable on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage (g).
- iv. It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility; that is just the situation when it is

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a plaintiff may either sue in debt for the penalty, in which case he can only recover his proved damages to an amount not exceeding the penalty, or he may disregard the penalty clause and sue for damages for breach of contract: *Wa. v. Rederiaktiebolaget Luqqud*, [1915] 3 K. B. 66; 81 L. J. K. B. 1663; *Mitsu & Co., Ltd. v. Watts, Watts & Co., Ltd.*, [1917] A. C. 227; 86 L. J. K. B. 873. If, however, a fixed sum has been agreed as damages, he cannot recover more, whatever his actual damages: *Cellulose Acetate Silk Co. v. Widne Foundry*, [1933] A. C. 20; 101 L. J. Ch. 891.

(f) [1915] A. C. 9; 83 L. J. K. B. 1571; 111 L. T. 862; 30 T. L. R. 625.

(g) See e.g., *Lock v. Bell*, [1931] 1 Ch. 35; 100 L. J. Ch. 22; 114 L. T. 106.

possible that pre-estimated damage was the bargain between the parties (*h*).

### SECTION 2.—*Equitable Remedies*

Common Law remedies are obtainable as of right, but equitable remedies are discretionary and may be refused for reasons which would have no operation at Common Law, as, *e.g.*, because the plaintiff has, by his conduct, disentitled himself from relief or because the remedy which he claims would be a great hardship for the defendant. The remedies of specific performance and injunction were granted by the Court of Chancery only when the Common Law remedy of damages was inadequate: after the *Judicature Act*, 1878, they might be granted by any Division of the High Court, but, in granting or refusing them, the Court must have regard to equitable principles (*i*).

*Specific performance*.—This remedy was, in Equity, considered particularly appropriate to contracts for the selling and letting of land, and was not granted to enforce contracts for the sale of goods which could be procured in the open market, though it might be decreed in the case of goods which had some particular quality or characteristic (*h*); so, also, it was not granted to enforce contracts relating to personal services or involving a series of continuous acts, the performance of which the Court could not effectively superintend (*l*). It was also refused (*i*) where there was an absence of mutuality, as, *e.g.*, where the plaintiff is an infant and the contract could not be enforced against him; and (*ii*) where, although the contract was under seal, it was not made for valuable consideration.

(*h*) See *Re Lord's and Hony Grovers, Ltd. v. Darnley*, [1928] 2 K. B. 174; 91 L. J. K. B. 503, 133 L. T. 76, 44 T. L. R. 113.

(*i*) *Ibid.* pp. 5, 6. By s. 31 of the *Judicature Act* (now re-enacted by s. 56 of the *Supreme Court of Judicature (Consolidation) Act*, 1925), actions for specific performance of contracts for the sale of land were assigned to the Chancery Division.

The *New York*, by s. 2 of the *Sale of Goods Act*, 1893 (*post*, Part III, Chapter V, section 1), for the first time made it possible to specifically enforce a contract for the sale of goods of exceptional quality, and to require the specific delivery of a chattel. It is, however, not possible to require the specific delivery of a chattel in the case of a contract for the sale of goods, on payment of their value, retained or sold by the plaintiff.

(*l*) A contract to perform a series of continuing contracts will not be ordered. It is, however, possible to have a contract specifically enforced in *Wolfehampton Corporation v. Farmers*, [1930] 1 K. B. 715, 70 L. J. K. B. 429. So is a contract to perform a series of contracts to lend money is not enforced; but by s. 92 of the *Contract Act*, 1938, a contract to take debentures of a company may be specifically enforced.

*Injunction.*—An injunction is granted only to restrain the breach of a *negative contract*, and for this purpose is a remedy analogous to that of specific performance, so that its grant is governed by most of the same rules (*m*). As a general rule, if the contract is negative in substance, it is not necessary that it should contain an express negative stipulation (*n*). But where the contract is one to which the remedy of specific performance is not applicable, *e.g.*, a contract for personal services, its breach will not be restrained by injunction unless there is an express negative stipulation severable from the affirmative stipulations.

Thus, in the case of *Lumley v. Wagner*, the defendant agreed to sing at the plaintiff's theatre during a certain time, and not to sing elsewhere during that time. It was held that, though the Court could not enforce specific performance of the contract to sing at the theatre, it would restrain the violation of the express stipulation not to sing elsewhere (*o*).

Where a negative contract provides for the payment of liquidated damages in case of breach, the plaintiff cannot claim an injunction as well as damages, but must elect between the two remedies (*p*).

(*m*) *Doherty v. Allman*, 3 A. C. 709; 39 L. T. 120

(*n*) See *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; 70 L. J. Ch. 469; 81 L. T. 436; 17 T. L. R. 410; *Metropolitan Electric Supply Co. v. Gardner*, [1901] 2 Ch. 799; 70 L. J. Ch. 862, 81 L. T. 818; 17 T. L. R. 435; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C., at p. 125.

(*o*) 21 L. J. Ch. 899; 91 R. R. 193; 1 De G. M. & G. 601. See also *Relya-Bell Burglar Alarm Co. v. Eisler*, [1926] 1 Ch. 609; 95 L. J. Ch. 345. But, even in the case of such a contract, the Court will not enforce the negative covenant if the effect of so doing would be that the defendant must either remain idle or perform the positive covenant. And, if an injunction is granted, it may be limited to such a time as the Court deems reasonable: *Warner v. Nelson*, [1937] 1 K. B. 209.

(*p*) *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 355; 16 T. L. R. 161.



## PART II

### TORTS

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#### CHAPTER I

##### SECTION 1.—*Liability in Tort*

##### SUB-SECTION 1.—*The difference between a breach of contract and a tort*

AN action for a breach of contract is, as we have seen, an action for the violation of a right created by an agreement or promise. An action of tort, on the other hand, is an action for the violation of a right created by law. Moreover, while all actions of contract are based upon the violation of a right against a determinate person, an action of tort may be based upon the violation either of a right against a determinate person, as in the case of an action of negligence against a bailee, or of a right against the whole world, as in the case of an action of trespass to land.

The distinction between tort and contract is one for substance and not of form (a), and is of importance for many purposes, e.g., as regards the costs of an action brought in the High Court when it could have been brought in the county court (b). In consequence, however, of the original relationship between the action of *assumpsit* and the action of case, there were, even under the old system of pleading, certain cases in which the violation of a right *in personam* might be treated by a plaintiff either as a breach of contract or a tort. Thus, a claim by a railway passenger against the company for failure to carry him safely might be made the subject of an action either of contract or tort.

In such cases the wrong was sometimes said to be a "tort founded on contract" because, though it was a violation of a right created by law, that duty existed as a result of a contractual relationship between the parties.

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(a) *Taylor v. Manchester, etc., Ry.*, [1893] 1 Q. B., at pp. 139, 140.  
(b) See *ante*, p. 16.

Now, however, it is settled that an action is founded on contract only when the plaintiff relies upon the existence of a contract and a breach of some *express or implied term* of that contract (c), but it is founded on tort when it is based upon the breach of a duty imposed by law independently of any contractual obligation, even though there may be a contract between the parties and it may be necessary to refer to the *existence* of that contract in order to show a relationship between them out of which the duty arises (d).

So, an action brought by a railway passenger against the company for damages for personal injuries caused by the negligence of the company's servants is an action of tort, not of contract; for it is an action that can be maintained by anyone lawfully upon the premises of the company. "The fact that the plaintiff happens to have a contract, that is to say, a ticket, is of use in such an action, it is true, for the purpose of showing that the plaintiff was lawfully where he was when he sustained the injury; but proof of the fact can be given *aliunde*, and proof of a contract is by no means vital to success" (e).

So, also, an action against a dentist for unskillfully extracting a tooth is an action of tort, though his duty to use proper skill may arise out of a contractual relationship between himself and his patient (f).

But an action against a stockbroker for damage caused by a breach of duties which were regulated by the terms of his employment is an action of contract (g).

Again, in contracts of bailment, a duty not to be negligent in respect of the article bailed is imposed upon the bailee by the Common Law, independently of any contract. If, therefore, a plaintiff complains merely of a breach of that Common Law duty, his action is one of tort; "but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the Common Law liability arising out of the relation of bailor and bailee", then the action must be one of contract (h).

(c) *Ibid.*, and see *Turner v. Stallibrass*, [1898] 1 Q. B., at p. 59; 67 L. J. Q. B. 52; *Edwards v. Mallan*, [1908] 1 K. B., at p. 1005; 77 L. J. K. B. 618.

(d) *Sachs v. Henderson*, [1902] 1 K. B., at p. 617; *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. 899.

(e) *Taylor v. Manchester, etc., Ry* (*ubi supra*).

(f) *Edwards v. Mallan* (*ubi supra*).

(g) *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. 899.

(h) *Turner v. Stallibrass* (*ubi supra*).

A defendant may be liable to an action of tort at the suit of B, although his breach of duty arose out of a contract which he made with A.

Thus, if a husband or father engages a surgeon for his wife or child, an action for damages caused by negligent or unskilful treatment may be brought by the wife or child, because a duty to take care arises from the relation of surgeon and patient, although there is no privity of contract between them (i).

So, also, where the servant of A took a ticket for a journey on the defendants' railway, and handed to the defendants' servants as his personal luggage a portmanteau containing the property of A, it was held that A could sue for damages caused to his property by the negligence of the defendants' servants. Here the right of A was independent of contract and would have existed though there had been no contract with the servant. For, since the portmanteau had been accepted by the defendants' servants for the purposes of carriage it was a wrongful act for them to deal negligently with it (k).

But in the absence of any duty towards *himself*, B cannot maintain an action upon a contract made between A and the defendant.

Thus, if A sends a message to B by a telegraph company, and a mistake is made by the company whereby damage is caused to B, no action can be maintained against the telegraph company by B, because there is neither privity of contract between him and the company, whose only contract was with A; nor does the contract cast upon the company any duty towards B (l).

#### SUB-SECTION 2.—*Torts which are also criminal offences*

The distinction between torts and criminal offences is that a tort is an infringement of a *private right*, for which the *injured person* can obtain *compensation* by *civil proceedings*, whereas a criminal offence is an offence *against the State* for which *punishment* is exacted *by the State* as a result of *criminal proceedings*.

There is, however, nothing in the nature of an act which determines whether it is a civil injury or a crime, and the same act may be both a tort and a crime. Thus, an assault and

(i) *Pippin v. Sheppard*, 11 Price 401; *Gludcell v. Steggall*, 5 Bing. N. C. 793.

(k) *Meux v. Great Eastern Ry.*, [1895] 2 Q. B. 387; 64 L. J. Q. B. 657. Compare *Marshall v. York, etc., Ry.*, 11 C. B. 655; 21 L. J. C. P. 34, where a servant successfully sued for the loss of his luggage, his ticket having been taken by his master.

(l) *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1; 47 L. J. C. P. 1. See also *Le Lievre v. Gould*, [1898] 1 Q. B. 491; 62 L. J. Q. B. 353.

a libel are torts, entailing liability to civil proceedings for damages, and they are also punishable as criminal offences.

Where an act is both a tort and a crime the effect upon the civil rights of the injured party depends upon whether the crime was a felony or a misdemeanour. "If injuries are inflicted on an individual under circumstances which constitute a *felony*, that felony cannot be made the foundation of an action at the suit of the person injured against the person who inflicted the injuries, until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution" (m). Accordingly where the plaintiff's cause for action is based on a felonious act committed on him by the defendant, the Court, in the absence of any excuse for non-prosecution, will stay all proceedings until the prosecution of the defendant, and an application to stay the proceedings on this ground may be made by the defendant (n). The rule is based upon "the duty imposed on the injured person not to resort to the prosecution of his private suit to the neglect . . . of the vindication of the public law" (o). It does not therefore apply—

- (i) Where without any default in the plaintiff prosecution of the felon has become impossible, as by his death or escape from the jurisdiction before prosecution was possible (p).
- (ii) Where the felon has already been brought to justice at the instance of some other person injured by a similar offence (p).
- (iii) Where the action is not against the felon himself, *e.g.*, is against a person who has innocently acquired stolen property (q).
- (iv) Where the action is not brought by the person immediately injured by the felony, *e.g.*, an action by a father for the seduction of his daughter aggravated by a felonious act (r).

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(m) *Smith v. Selwyn*, [1914] 3 K. B., at p. 105; 88 L. J. K. B. 1339; *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38; 86 L. J. P. 58.

(n) *Smith v. Selwyn*, [1914] 3 K. B. 98. In this case all proceedings upon the existing statement of claim were stayed, with leave to the plaintiffs to amend the statement of claim within twenty-one days, so that they might, if possible, state a good cause of action without disclosing a felony, and in default of such amendment the action was stayed until after criminal proceedings should have been taken against the defendant.

(o) *Midland Insurance Co. v. Smith*, 6 Q. B. D., at p. 569; 50 L. J. Q. B. 329.

(p) *Ex p. Ball*, 10 Ch. D. 667; L. J. Bk. 57.

(q) *White v. Spettigue*, 13 M. & W. 603; 14 L. J. Ex. 99.

(r) *Appleby v. Franklin*, 17 Q. B. D. 93; 52 L. J. Q. B. 129. But in *Smith v. Selwyn* (*ubi supra*), where the action was brought by a husband and wife

If the tort is merely a *misdeemeanour* this rule does not apply, and either civil or criminal proceedings, or both, may be taken. But, at any rate, in case of an assault, the Court may refuse to pass sentence in criminal proceedings while an action is pending for the tort (s).

In the case of assault also, the fact that criminal proceedings have been taken may, under ss. 44 and 45 of the *Offences against the Person Act*, 1861, be a bar to subsequent civil proceedings. These sections provide (i) that if justices, upon the hearing upon the merits of any summary proceedings for assault or battery upon complaint preferred by or on behalf of the person aggrieved under ss. 42 and 43 of the Act, shall deem the offence not proved, or to be justified, or to be so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out and deliver to the party against whom the complaint was preferred a certificate stating the fact of such dismissal; (ii) that if any person against whom any such complaint shall have been preferred shall have obtained such a certificate, or having been convicted shall have paid the fine imposed, or suffered the imprisonment awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

If, however, a servant commits an assault in the course of his employment, his release from civil proceedings under the provisions of this Act does not affect the civil liability of his master (t).

#### SUB-SECTION 8.—*The conditions for the maintenance of an action of tort*

The law of torts, as has already been briefly stated, is based upon the principles which governed the Common Law actions of *Trespass*, *Detinue*, *Conversion* and *Case* (u).

The conditions for the maintenance of an action of trespass, detinue or conversion are, for the most part, well settled, and, save in exceptional circumstances, there is, as a rule, not much doubt as to what facts constitute these torts.

But the action of case was not limited to any specific facts. It was based upon the general theory of providing a remedy for

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for a criminal assault upon the wife, it was held that the husband's claim was too trifling and too closely connected with that of the wife to enable him to maintain an action before prosecution of the defendant.

(s) *R. v. Mahon*, 4 Ad. & Ell. 575.

(t) *Dyer v. Munday*, [1895] 1 Q. B. 712; 64 L. J. Q. B. 448.

(u) *Ante*, p. 8.

any wrong which was analogous to a wrong already recognised and defined by law. Its sphere of application was therefore capable of almost indefinite expansion and it was used by the Courts for the purpose of creating many new types of action (x).

The action of conversion was originally an action of case, and many other actions of case, as, for instance, actions of nuisance, also became distinct types of actions, governed by rules which were formulated in great detail.

The Statute of Westminster II was repealed by the Statute Law Revision Act, 1863, and technically speaking the action of case no longer exists. But its spirit still survives, and the Courts still can create new actions in new circumstances provided that in so doing they act in accordance with recognised principles. Of these the following are the most important:—

1. *No action lies for damnum sine injuria.* “If a man sustains damage by the wrongful act of another he is entitled to a remedy. That he has sustained damage is not of itself sufficient” (y). This maxim, which has already been noticed (a), is of the utmost importance in the law of torts. Many illustrations of its application have occurred with regard to the use of land by adjoining landowners. No one may use his land so as to *interfere* with the rights of his neighbours. On the other hand, if a man is only exercising his own absolute rights, no action will lie against him for causing damage to his neighbour. The maxim “*sic utere tuo ut alienum non lædas*” means simply this: “I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb: subject to this qualification I may occupy or use my own as I please” (b). Thus, when water flows in a defined and known channel, above or below ground, every owner of the land through which it flows has an equal right to its enjoyment and no one owner may make use of the water in such a way as to infringe the rights of the others (c). But when water flows over, or percolates under, land in no defined course or channel, the owner of the land may apply it to his own purposes as he thinks fit, and may even entirely prevent it from reaching the land of his neighbour, who has no legal right to the enjoyment of water which may come to him otherwise than in a definite channel.

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(x) See *Nooton v. Ashburton*, [1914] A. C., at pp. 947, 948.

(y) *R. v. Pagham*, 8 B. & C., at p. 362; 6 L. J. (o.s.) K. B. 338; 32 R. R. 406.

(a) *Ante*, p. 14.

(b) *Deane v. Clayton*, 7 Taunt., at p. 259.

(c) *Embrey v. Owen*, 6 Ex. 358; 20 L. J. Ex. 212.

Accordingly, in such case, however much damage may be suffered by the abstraction of the water, no action will lie because it is caused in the exercise of an absolute legal right and creates no legal wrong (*d*).

This rule applies not only to the use of land but to the exercise of other rights. Thus the right of a man to carry on his trade or vocation must be co-ordinated with the equal and similar rights of his fellow-traders, and he must put up with any loss caused to him by their lawful exercise of their own rights. Accordingly, a trader commits no wrong if, by attractive methods applied to his own business, he allures to himself the customers of his rival, and so destroys the latter's business. But if, going beyond legitimate competition, he interferes with the conduct of his rival's business or molests him or drives away his customers, he goes beyond legitimate competition and commits an actionable wrong (*e*). So, also, though a trader may say of his own goods that they are better than any other similar goods, he will be liable to an action if he causes damage to a rival by a false disparagement of the latter's goods (*f*).

Apart from rights created by statute, the rights whose infringement constitutes a tort are of two classes (*g*), namely:—

- (i) Absolute rights, the mere invasion of which gives a right of action irrespective of whether any actual damage has been caused to the plaintiff;
- (ii) Limited or qualified rights, which are merely rights to be protected against and indemnified in respect of any damage unjustifiably caused by others, so that in the absence of damage there is no actionable wrong.

Everyone, for instance, has an absolute right to enjoy his own land without any interference by his neighbour, and for any trespass by his neighbour he may maintain an action although he has suffered no pecuniary damage. On the other hand a person who is walking or driving on a highway has no absolute right to immunity from harm, though he has a right to be indemnified for any actual damage caused by the negligence of other persons using the highway.

It is impossible to formulate any general rule which determines whether or not either class of rights exists. The existence and

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(*d*) *Acton v. Blundell*, 12 M. & W. 321; 13 L. J. Ex. 289; 67 R. R. 361; *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 115 R. R. 187.

(*e*) See *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; 61 L. J. Q. B. 295; *Allen v. Flood*, [1898] A. C. 1; 67 L. J. Q. B. 119; *Quinn v. Leatham*, [1901] A. C. 495; 70 L. J. P. C. 76.

(*f*) *White v. Mellin*, [1895] A. C. 154; 64 L. J. Ch. 308.

(*g*) See *Hammerton v. Dyson (Earl)*, [1916] 1 A. C. 57; 85 L. J. Ch. 88.

nature of many rights have been settled by the Courts, but questions still arise and must always continue to arise as to whether, in particular circumstances that have never yet been the subject of judicial decision, any cause of action arises. In some cases the answer to such a question may depend upon the construction of a statute. In others it can be found only by the application or, frequently, by the extension of existing principles. In this way there is in effect a continuous creation of new rules and principles which sometimes take divergent courses leading to curious results. Thus, it is settled law that, if I let an unfurnished house to A for the use of himself and his family, knowing that it is in a dangerous condition and contracting to repair it, I am not at Common Law liable to A's wife if she is injured in consequence of its condition (*h*). It is on the other hand settled that if I am a manufacturer of ginger beer, and through want of care I sell to a retailer a bottle containing a snail, I am liable to a purchaser from him who is made ill by drinking the polluted ginger beer (*i*).

2. *Every malicious invasion of civil rights is actionable.* Malice in this sense does not mean what is sometimes called "malice in fact" or "express malice", *i.e.*, ill-will or improper motive, but "malice in law", which exists whenever a wrongful act is done intentionally (*i.e.*, wilfully or voluntarily and not by accident), without justification or excuse (*k*).

Thus, in the case of *Wilkinson v. Downton* (*l*), the defendant, as a practical joke, represented to the plaintiff that her husband had met with a serious accident, so causing a severe shock to her nervous system and permanent physical consequences. It was held that these facts constituted a good cause of action. The defendant wilfully and without justification did an act infringing the right of the plaintiff to personal safety and this wilful *injuria* was in law malicious, although there was in fact no malicious purpose or motive of spite.

The above rule is, however, subject to one exception. Where the wrong consists merely in the violation of a public right, as, *e.g.*, in the case of an obstruction of a public highway, or in the failure to perform a statutory duty owed to the public, as, *e.g.*, a statutory duty to maintain a canal in navigable condition,

(*h*) *Cavalier v. Pope*, [1906] A. C. 428; 75 L. J. K. B. 619

(*i*) *Donoghue v. Stevenson*, [1932] A. C. 562; 101 L. J. P. C. 119.

(*k*) *Bromage v. Prosser*, 4 B. & C., at p. 255; *Allen v. Flood*, [1898] A. C., at pp. 98, 94, 124.

(*l*) [1897] 2 Q. B. 57; 66 L. J. Q. B. 493, approved in *Janvier v. Sweeney*, [1919] 2 K. B. 316. See also *Dulieu v. White*, [1901] 2 K. B. 669; 70 L. J. K. B. 837.



an action cannot be maintained except by a person who has suffered some special or peculiar damage beyond what is suffered by the rest of the public (m).

8. *The exercise of a legal right is not wrongful because it is prompted by malice in fact or improper motive (n).* But the presence of malice in fact may negative the existence of justification or excuse. Thus a libel is in law malicious, and the plaintiff need not in the first instance allege that the defendant was actuated by malice in fact; libel is, however, excused if the words complained of were used on a privileged occasion; but that excuse may be rebutted by proof of express malice and abuse of the privilege (o). So also, "it is not a wrongful act for a person who honestly believes that he has a reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive . . . is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice, becomes with malice wrongful and actionable" (p). Similarly, acts which would not otherwise constitute a nuisance may amount to a nuisance if done maliciously (q).

Conversely, if a person commits an unlawful act, the absence of an improper motive is no defence (r).

4. *Where no absolute right has been infringed an action will lie only if (i) the plaintiff has suffered some "special damage" (i.e., actual loss or injury) and (ii) such damage was caused by an unjustifiable act or breach of duty on the part of the defendant (s).* Thus, in ordinary circumstances, an action for trespass to land is an action for the violation of an absolute right and is maintainable without proof that the plaintiff has suffered any special damage (t), or that the defendant was guilty of negligence (u). But the owner of land adjoining a highway has

(m) *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; 36 L. J. Ex. 194; *Blundy v. London and North Eastern Ry.*, [1931] 2 K. B. 334; 100 L. J. K. B. 401.

(n) *Quinn v. Leatham*, [1901] A. C., at p. 521. See also *Bradford Corporation v. Pickles*, [1895] A. C. 587; *Allen v. Flood* (*ubi supra*).

(o) *Allen v. Flood*, [1898] A. C., at p. 172.

(p) *Quinn v. Leatham*, [1901] A. C., at p. 521.

(q) *Hollywood Silver Fox Farm v. Emmett*, [1936] 2 K. B. 468.

(r) *Allen v. Flood*, [1898] A. C., at p. 124. Cf. *Derry v. Peek*, 14 A. C., at p. 314 (*ante*, p. 107).

(s) *Bowen v. Hall*, 6 Q. B. D. 333; 50 L. J. Q. B. 305; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.

(t) *Williams v. Morland*, 2 B. & C., at p. 916.

(u) *Humphries v. Cousins*, 2 C. P. D. 239; 46 L. J. C. P. 438; 36 L. T. 180.

no such absolute right, and can maintain an action only in respect of damage wilfully or negligently done to his property by persons using the highway (x).

Thus, in *Tillett v. Ward* (y), an ox being driven along a highway entered the plaintiff's shop and damaged his goods. *Held*, that no action would lie in the absence of negligence on the part of the drover.

Similarly, in cases of malicious prosecution, deceit and conspiracy to injure, the cause of action is not the invasion of an absolute right but the fact that damage has been done to the plaintiff by an unjustifiable act (z).

5. *The breach of a statutory duty does not necessarily give rise to an action.* There are many duties which were unknown to the Common Law and have been created by statutes or by regulations made under the authority of statutes. The breach of such duties does not always give a right of action to a person who thereby suffers damage, and the question whether or not, in any particular case, a right of action exists depends upon the "scope and purpose" of the statute (a). In this connection there are, broadly speaking, three main types of statutes and statutory regulations.

There is one type whose purpose is to impose upon employers duties for the protection of their servants.

There is another type whose purpose is to secure the proper performance by local authorities of their functions and the proper management of their undertakings by bodies with statutory powers such as gas companies and water companies.

A third type consists of those which, as in the case of the various measures governing motor traffic, contain rules governing the general public, or which prescribe conditions that must be observed by persons carrying on certain occupations, as, e.g., shipowners and farmers.

The breach of a duty created by any of the foregoing types of statutes and statutory regulations is usually punishable by fine or, in some cases, by imprisonment. Sometimes, however, a special remedy is given to an injured person.

The question whether, in any particular case, a remedy by action exists has been dealt with as follows by the Courts:—

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(x) *River Wear Commissioners v. Adamson*, 2 A. C., at p. 767; 46 L. J. Q. B. 88.

(y) 10 Q. B. D. 17; 52 L. J. Q. B. 61.

(z) See *Nicholls v. Ely Beet Sugar Factory*, [1936] 1 Ch., at p. 351.

(a) *Butler v. Pife Coal Co., Ltd.*, [1912] A. C., at pp. 155, 156, affirming *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441; 46 L. J. Ex. 775.

*Prima facie* the rule is that, where there is a breach of a statutory duty resulting in special damage to an individual, an action for damages will lie unless the statute shows clearly that no such right was intended to be given (b).

The intent to exclude a right of action may be shown by the fact that a special remedy for the breach is created by the statute (c), as, *e.g.*, where it is punishable by a penalty payable to the injured person (d), or where the performance by a local authority of its duties can be enforced in some method prescribed by the statute, *e.g.*, by complaint to the Local Government Board (e). It may also be excluded by the fact that the statute penalises something for which a civil remedy already existed. Thus, in *Square v. Model Farm Dairies, Ltd.* (f) the defendants had contracted to sell milk which would be clean, pure and free from infection. In fact some of the milk supplied was contaminated with the result that several members of the purchaser's family became ill. The purchaser and the affected members of his family claimed damages (i) under the Sale of Goods Act, 1898—for breach of contract, and (ii) for breach of the statutory duty created by s. 2 of the Food and Drugs (Adulteration) Act, 1928, by which a penalty was imposed for the sale of milk which is not of the nature, substance, or quality demanded by the purchaser. It was held that no damages could be recovered for breach of the statutory duty because the Act of 1928 merely imposed a penalty where a civil remedy already existed.

But where the statutory duty is created for the benefit of a particular class of persons they have a *prima facie* right of action for damages caused by its breach which is not excluded by the fact that a penalty for the breach is imposed by the statute (g). This principle has been applied in many cases, *e.g.*, where a workman was injured through the failure of his employer to fulfil a statutory duty of fencing dangerous machinery (h) and where a miner was injured through the breach of statutory

(b) *Monk v. Warbey*, [1935] 1 K. B. 77; 104 L. J. K. B. 583, and see *Blundy, Clark & Co. v. London and North Eastern Ry.*, [1931] 2 K. B. 335; 100 L. J. K. B. 401.

(c) *Doe v. Bridges*, 1 B. & Ad., at p. 859.

(d) *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D., at p. 447; 46 L. J. Ex. 775.

(e) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A. C. 887; 67 L. J. Q. B. 635.

(f) [1939] 2 K. B. 365; 108 L. J. K. B. 198.

(g) *Butler v. Fife Coal Co.* (*ubi supra*).

(h) *Groves v. Wimborne*, [1898] A. C. 887; 67 L. J. Q. B. 682.

regulations imposed upon mineowners for the protection of their miners (i).

On the other hand, where penalties are imposed upon local authorities and statutory bodies for breaches of statutory duties, it has generally been held that the only remedy for such breaches is to take proceedings for the penalty. This principle has also been applied in many cases, *e.g.*, where a local sanitary authority failed to perform its statutory duty of clearing snow from the streets (k), and where a gas company or water company failed to give a supply sufficient to satisfy the requirements of the Act by which it was regulated (l). And when a statutory duty is imposed upon the public or upon persons engaged in particular occupations an action will lie for its breach only if the purpose of the statute was to protect the public and the damage complained of is such as it was the object of the statute to prevent. Thus—

In *Gorris v. Scott* (m), an action was brought to recover damages for the loss of sheep which the defendant, a shipowner, had contracted to carry and which were washed overboard through his failure to provide the kind of pens prescribed by an order made under the Contagious Diseases (Animals) Act, 1869. *Held*, that the Act was passed merely for sanitary purposes, in order to prevent the spread of infectious diseases among imported animals and not to prevent them from being washed overboard. No action would therefore lie, though it might perhaps have been maintained if by reason of the default the sheep had arrived in a state of disease.

Again, in *Phillips v. Britannia, etc., Laundry Co.* (n) a motor lorry was upon the road with a defective axle. This was a breach of a regulation made by the Local Government Board under the Locomotives on Highways Act, 1896. The axle broke so that a wheel of the lorry came off and injured another vehicle. *Held*, that the owner of the vehicle had no right of action, because the object of the regulations was not the protection of persons using the highway.

So also, in *Badham v. Lambs, Ltd.* (o), where the defendant in breach of s. 8 (1) of the Road Traffic Act, sold to the plaintiff a car in such a condition that its use on a highway in that condition would be dangerous, and thereby subjected himself to a penalty, it was held that, as the object of the section was the punishment of offenders, no action based on its breach could be brought by the plaintiff.

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(i) *Butler v. Fife Coal Co., Ltd.*, [1912] A. C. 149; 81 L. J. P. C. 97.

(k) *Saunders v. Holborn Board of Works*, [1895] 1 Q. B. 164; 64 L. J. Q. B. 101.

(l) *Clegg, Parkinson & Co. v. Earby Gas Co.*, [1896] 1 Q. B. 592; 65 L. J. Q. B. 839 (Gas); *Atkinson v. Newcastle Waterworks Co.* (*ubi supra*) (Water).

(m) L. R. 9 Ex. 170; 48 L. J. Ex. 92. See also *Ward v. Hobbs*, 4 A. C., at p. 23; 48 L. J. C. P. 281.

(n) [1928] 2 K. B. 892; 98 L. J. K. B. 5.

(o) [1946] 1 K. B. 45; 115 L. J. K. B. 180.

And, in *Clarke v. Brims* (p) it was held that a breach of the provisions of s. 1 of the Road Transport Lighting Act, 1927, requiring every vehicle to show a red light to the rear during the hours of darkness is a breach of public duty for which a remedy is provided by s. 10 of the Act, and which does not give a right of action to a person who has suffered thereby.

On the other hand, in *Monk v. Warbey* (q), the defendant permitted his motor car to be used by a person who was not insured against third party risks. This is an offence against the Road Traffic Act, 1930, and is punishable by fine and imprisonment. Held, that the purpose of the Act was to protect those who suffered injury from the negligent driving of uninsured persons to whom insured persons had lent vehicles, that the civil remedy was not excluded because penalties were provided, and that a person injured by the negligence of the borrower could recover damages from the lender.

It should, however, be noticed that at Common Law no action lay against a highway authority for non-feasance, i.e., for damages caused by mere non-repair of the highway (r), and this rule has not been altered by the mere fact that the obligation to repair highways has been transferred by statute to public authorities unless a distinct intention to create a new right of action is shown by the Act transferring the obligation (s). But this exemption does not apply to commercial corporations, such as railway and canal companies, on whom the duty of repairing roads or bridges has been imposed as one of the Parliamentary terms upon which they obtained their powers (t). And it applies only in respect of ordinary highway duties and the non-repair of the highway as such; it does not extend to the non-performance of other duties which have been undertaken by a body which is the highway authority (u).

Thus in *Skilton v. Epsom and Ewell U.D.C.* (w), the defendants, who were highway authorities, placed traffic studs in a highway and allowed them to become so defective that they constituted a nuisance, in consequence of which the plaintiff suffered damage.

(p) [1947] K. B. 497; [1947] L. J. R. 863.

(q) *Ubi supra*.

(r) *McKinnon v. Penon*, 9 Ex. 609; 23 L. J. M. C. 97; *Cowley v. Newmarket Local Board*, [1892] A. C. 345; 62 L. J. Q. B. 65; *Thompson v. Brighton Corporation*, [1891] 1 Q. B. 332; 63 L. J. Q. B. 181; 70 L. T. 206; *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433.

(s) *Cowley v. Newmarket Local Board*, [1892] A. C. 345; 62 L. J. Q. B. 65; *Maquire v. Liverpool Corporation*, [1906] 1 K. B. 767; 74 L. J. K. B. 369.

(t) *Swain v. Southern Ry.*, [1939] 2 K. B., at p. 372; 108 L. J. K. B. 827. See also *Blundy, Clarke & Co. v. London & North Eastern Ry.*, [1931] 2 K. B., at p. 339.

(u) *Simon v. Islington Borough Council*, [1948] 1 K. B., at p. 197.

(w) [1937] 1 K. B. 112; 106 L. J. K. B. 41.

It was held that they were liable because their non-feasance was not in the course of their duty to repair the highway, but in the exercise of powers conferred upon them by the Road Traffic Act, 1930.

The same principle was applied in *Simon v. Islington Borough Council* (x). In this case a tramway had been abandoned by the London Passenger Transport Board under the powers given by s. 23 of the London Passenger Transport Act, 1933, and, under powers given by the same section, the defendant Council had given notice to the Board that it proposed to take up the tramway and make good the surface of the road. The property in and the possession of the tramway accordingly passed to the Council which for over two years did nothing to the track and allowed it to get in such a dangerous condition that a cyclist skidded upon it and was killed. It was held that the Council was liable because the tram lines were an artificial work, foreign to the roadway and inserted in it under powers given by the Tramway Act, 1870. "They were no part of the road proper and the duty of the Council as highway authority was to treat them as obstructions to traffic, protect traffic from their dangers, and abate the nuisance as soon as they could" (y).

And, though no action lies against a local authority for mere non-feasance, it is liable for *misfeasance* in the execution of its powers, as, for example, if in making up, altering, or diverting a highway, it creates some danger or omits some precaution which would have made the work safe instead of dangerous (z). If, therefore, a highway authority or other local authority creates upon or under a highway an artificial work, such as a grating or sewer, and negligently allows it to become in a dangerous condition, it is liable to an action at the suit of any person who has in consequence suffered damage while using the highway (a). So where a local authority erected on a highway an air raid shelter, it was held that when street lighting was for any reason suspended it was under an obligation to take such reasonable steps, by special danger lights or otherwise, to safeguard the public (b).

But it is not liable if an artificial work which is lawfully created subsequently becomes dangerous through extraneous causes for which it is not responsible.

(x) [1948] 1 K. B. 188.

(y) [1948] 1 K. B., at p. 198.

(z) See, e.g., *Whyler v. Bingham Rural Council*, [1901] 1 K. B. 45; 70 L. J. K. B. 207; *McClelland v. Manchester Corporation*, [1912] 1 K. B. 118; 81 L. J. K. B. 98.

(a) *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590; 70 L. J. K. B. 338; 84 L. T. 387.

(b) *Fisher v. Ruislip Northwood U. D. C.*, [1945] K. B. 584; 178 L. T. L. T. 261, overruling *Lyus v. Stepney Borough Council*, [1941] 1 K. B. 134.

Thus, in *Moore v. Lambeth Waterworks Co.* (c), the defendants had lawfully fixed in the pavement a fire-plug which, through the wearing away of the pavement, projected above its surface and tripped the plaintiff. It was held that, as the fire-plug itself was in good order, the defendants were not liable.

#### SUB-SECTION 4.—*Who may sue and be sued in tort*

As a general rule, every person may sue and be sued in an action of tort. To this rule there are, however, certain exceptions, of which the following are the most important:—

An alien enemy, unless here by the licence or under the protection of the Crown, cannot sue (d).

A convict cannot, during the continuance of his sentence, bring any action for the recovery of any property, debt, or damage, except while lawfully at large under any licence (e).

A husband cannot sue his wife in tort; a wife cannot sue her husband in tort except “for the protection and security of her own property” (f). If, however, a husband, while acting as agent for somebody else, commits a tort which results in injury to the wife, she is not deprived of her right to recover against her husband’s principal (g).

Interpleader proceedings are not an action and where, in an action, a husband and wife both claim goods from the defendant, an order may be made directing an interpleader issue to be tried between them (h).

A corporation cannot sue for a tort merely affecting its reputation (i), but it can sue for a libel affecting its property. “A corporation or company could not sue in respect of a charge

(c) 17 Q. B. D. 462; 55 L. J. Q. B. 809 (approved in *Great Central Ry. v. Hewlett*, [1916] 2 A. C. 511; 85 L. J. K. B. 1705).

(d) *Ante*, p. 145.

(e) *Ante*, p. 145.

(f) Married Women’s Property Act, 1882, s. 12, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, First Schedule. A claim by a married woman against her husband for damages for personal injuries sustained by his negligent driving of a car in which she was being driven by him before her marriage is a chose in action forming part of her separate property in respect of which she may maintain an action against him; *Curtis v. Wilcox*, [1948] 2 K. B. 474; 64 T. L. R. 892, overruling *Ottliffe v. Edelston*, [1930] 2 K. B. 378; 99 L. J. K. B. 517.

(g) *Smith v. Moss*, [1940] 1 K. B. 421; 109 L. J. K. B. 271.

(h) *De la Rue v. Hernu, Peron & Stockwell, Ltd.*, [1936] 2 K. B. 164.

(i) *Manchester Corporation v. Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23.

of murder, or incest or adultery, because it could not commit those crimes. . . . The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement or must attack its financial position". Thus where a colliery company owned cottages inhabited by their pitmen it was held that it could maintain an action for a newspaper libel stating that the cottages were unsanitary and unfit for human habitation (*k*).

It can generally be sued to the same extent as a private person for the acts of its servants, even in cases in which malice in fact is material, as, *e.g.*, in malicious prosecution and libel (*l*). The liability of a body created by statute depends, however, upon the statute by which it is created, but in the absence of anything to show a contrary intent it has the same Common Law duties and liabilities as a private person except that, as we have just seen, there are some cases in which it cannot be sued for mere non-performance of a statutory duty.

A trade union cannot be sued for a tort (*m*). This rule is not limited to torts in contemplation or furtherance of a trade dispute; thus it applies to an action of libel (*n*), and, since the term "trade union" includes any combination whose principal object is "the imposing of restrictive conditions on the conduct of any trade or business" (*o*), the protection given by s. 4 (1) of the Act of 1906 is not limited to combinations of masters and workmen but extends to an association of manufacturers, dealers and agents formed for the purpose of imposing restrictive conditions on the conduct of the trade for motor vehicles and accessories (*p*).

**The Crown.**—At common law the Crown could not be sued in tort, and a servant of the Crown who, as such, committed a tort, was personally liable. This principle, however, by the *Crown*

(*k*) *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293.

(*l*) *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196; *Citizens Life Assurance Co. v. Brown*, [1904] A. C. 423; 73 L. J. P. C. 102.

(*m*) Trade Disputes Act, 1906, s. 4 (1). The Trade Disputes and Trade Unions Act, 1927, has been repealed by the Trade Disputes and Trade Unions Act, 1916.

(*n*) *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107; 82 L. J. K. B. 282.

(*o*) Trade Union Act, 1913, ss. 1, 2.

(*p*) *Hardie and Lane, Ltd. v. Chiltern*, [1928] 1 K. B. 663; 96 L. J. K. B. 1040.



*Proceedings Act, 1947*, no longer applies to torts committed after February 18, 1947.

The main provisions of Part I of this Act which are here relevant are as follows :—

S. 2 (1). Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject :—

- (a) in respect of torts committed by its servants or agents ;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer ; and
- (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property :

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

Sub-s. (4) gives to the Crown the benefit of any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any tort committed by that department or officer.

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(6) No proceedings shall lie against the Crown by virtue of

this section in respect of any act, neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund of the United Kingdom, moneys provided by Parliament, the Road Fund, or any other Fund certified by the Treasury for the purposes of this subsection or was at the material time holding an office in respect of which the Treasury certify that the holder thereof would normally be so paid.

S. 11 (1). Nothing in Part I of the Act (*i.e.*, ss. 1-12) shall extinguish or abridge any powers or authorities which, if this Act had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any powers or authorities conferred on the Crown by any statute, and, in particular, nothing in the said Part I shall extinguish or abridge any powers or authorities exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of the realm or of training, or maintaining the efficiency of, any of the armed forces of the Crown (q).

A foreign independent sovereign cannot be sued in the Courts of this country unless he submits to the jurisdiction (r).

An infant is, in general, liable for his torts. But "he cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract. . . . But if an infant's wrongful act, though concerned with the subject-matter of a contract and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable" (s).

Thus, in *Jennings v. Rundall* (t), an infant, having hired a horse "to be moderately driven", rode it so carelessly that it was injured. It was held that he was not liable, because his conduct was a breach of the contract under which the horse was hired.

Again, in *Fawcett v. Smethurst* (u), where an infant, having hired a car for a particular journey, drove it for a longer journey,

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(q) By s. 10 special provisions are made for exempting a member of the armed forces of the Crown, while on duty as such, from liability in tort for causing the death of or personal injury to another person. Part II of the Act deals with Jurisdiction and Procedure, and Part III with Judgments and Execution.

(r) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; 68 L. J. Q. B. 598.

(s) See *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B., at p. 620; 88 L. J. K. B. 1145.

(t) 8 T. R. 335; 14 R. R. 680.

(u) 84 L. J. K. B. 478; 135 R. R. 598, following *Jennings v. Rundall* (*ubi supra*).

during which it was damaged without any fault on his part, it was held that he could not be made liable in tort. It was argued that the defendant was a trespasser during the extension of the journey, and as such was under an absolute liability in respect of the car. It was held, however, that "nothing that was done upon that journey made the defendant an independent tortfeasor . . . the extended journey was of the same nature as the original one, and the defendant did no more than drive the car further than was originally intended"; the claim, therefore, was, in substance, for breach of contract.

On the other hand, in *Burnard v. Haggis* (x), where a mare was hired by an infant, with an express stipulation that it was not to be jumped, but it was jumped at a fence and injured, it was held that the infant was liable, as this was not a breach of duty arising out of a contract, but a trespass, "as distinct from the contract, as if the defendant had run a knife into her and killed her".

On the same principle in *Ballett v. Mingay* (a), where an infant, having hired goods, parted with the possession of them to a third person, it was held that he was liable in tort because the terms of the bailment did not permit him to part with their possession.

So also, if goods other than necessities are sold and delivered to an infant, he cannot be made liable for them in an action for conversion (b); nor can he in such a case be sued for money had and received where the cause of action is *ex contractu*.

Thus, in *Gouern v. Nield* (c), where an infant trader contracted to sell goods and was paid the price, but failed to deliver the goods, it was held that the purchaser could not recover the price in an action for money had and received.

But he may be so sued if the cause of action is purely *ex delicto*, as, for example, where he has misappropriated money entrusted to him (d).

A married woman is now capable of suing and being sued in tort in all respects as if she were a *feme sole* (e).

All joint tortfeasors are jointly and severally liable for the

(x) 14 C. B. (n.s.) 45.

(a) [1948] 1 K. B. 281.

(b) *Jennings v. Rundall*, 8 T. R., at p. 337.

(c) [1912] 2 K. B. 419; 81 L. J. K. B. 865.

(d) *Bristow v. Eastman*, 1 Esp. 172; 5 R. R. 728; *Re Seager, Seeley v. Briggs*, 60 L. T. 665. But see *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B., at p. 621; 83 L. J. K. B. 1145.

(e) Law Reform (Married Women and Tortfeasors) Act, 1935. At Common Law the same principle applied to the torts of a married woman as to torts of an infant. By s. 1 (2) (now repealed) of the Married Women's Property Act, 1882, she was made liable to be sued as a *feme sole* but her liability was only to the extent of her separate property.

whole damage, and may be sued jointly or separately (*f*). But there is only one cause of action, so that a judgment against one was at Common Law a bar to an action against the rest, even though it had not been satisfied (*g*), and a release of one (*h*) or satisfaction by one (*i*) releases all.

Two or more persons are joint tortfeasors when one wrongful act is committed by one on behalf of or in concert with the other or others, as, *e.g.*, where an agent commits a wrongful act within the scope of his authority for his principal, or where two or more persons agree on concerted action, in the course of which, and in furtherance of their common design, they commit a wrongful act; but there is no joint tortfeasance merely because the separate and independent wrongful acts of two persons cause damage by their conjoined effect: thus there is no joint tort in "the case of two ships which by quite independent and separate action ran into a third ship, one on the starboard and one on the port side, whereby she sank; of two persons uttering independently separate and distinct slanders concerning a servant whereby his master dismissed him; of two separate excavators who by independent excavations brought down the house of a third party" (*k*).

Animals may render their owners joint tortfeasors, as, *e.g.*, where two dogs belonging to different owners act in concert in the common design of worrying sheep (*l*).

If a plaintiff, having recovered judgment against several tortfeasors, levies the whole damages upon one, that one had, at Common Law, no right to recover contribution from the others (*m*).

But the law with regard to a judgment recovered against one joint tortfeasor and with regard to contribution between tortfeasors was completely altered by Part II of the *Law Reform (Married Women and Tortfeasors) Act, 1935* (*n*).

(*f*) *Sutton v. Clarke*, 6 Taunt. 29.

(*g*) *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 41 L. J. C. P. 190; *Goldrei, Foucard & Son v. Sinclair*, [1918] 1 K. B. 180; 87 L. J. K. B. 261.

(*h*) *Duck v. Mayeu*, [1892] 2 Q. B. 511; 62 L. J. Q. B. 69; but a mere covenant not to sue one of several joint tortfeasors does not release the rest (*id.*).

(*i*) *Thurman v. Wilde*, 11 Ad. & El. 458.

(*k*) *The Koursk*, [1924] P. 140; 93 L. J. P. 72, 399 (reviewing the authorities as to joint tortfeasors). See also *Brooke v. Bool*, [1928] 2 K. B. 578; 97 L. J. K. B. 511.

(*l*) *Arneil v. Paterson*, [1931] A. C. 560; 100 L. J. P. C. 161.

(*m*) *Merryweather v. Nizan*, 8 T. R. 186.

(*n*) By s. 4 of the Crown Proceedings Act, 1947, this section binds the Crown.

By s. 6 (1) of the Act it is provided that where damage is suffered by any person as a result of a tort (whether a crime or not)—

- (a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to any action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.
- (b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child (o) of that person, against tortfeasors liable in respect of the damage (*whether as joint tortfeasors or otherwise*), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given (p), and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs, unless the Court is of opinion that there was reasonable ground for bringing the action.

That is to say, although an injured person can recover judgment against each of several joint tortfeasors or each of several persons who are liable for the damage, he cannot by execution or otherwise enforce payment of more in all than the amount given by the first judgment. And, after he has obtained one judgment, he will not be entitled to the costs of any further action unless there was reasonable ground for bringing it as, e.g., because nothing can be recovered from the first defendant.

- (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

Where a person is authorised or employed to do some act which “is manifestly unlawful or which [he knows] to be unlawful as constituting either a civil wrong or a criminal offence, he

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(o) By s. 6 (3) of the Act the words “parent” and “child” have the same meanings as they have for the purposes of the Fatal Accidents Acts, 1846 to 1908, *see post*, p. 287.

(p) If the judgment first given is reversed on appeal this is to be construed as a reference to the first judgment which is not reversed, and, if the first judgment is varied on appeal, as a reference to it as so varied: s. 6 (3).

cannot maintain an action for . . . indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. But an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorised or fraudulently induced by an other to do an act indifferent in itself, which has turned out, because it constitutes a private wrong, to be unlawful, but which was not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness" (g).

But, under the foregoing provisions of paragraph (c), if A, B and C are all liable for the same damage and the circumstances were such that A is entitled to be indemnified by B, no contribution can be recovered by B from A.

By s. 6 (2) the *amount* of the contribution recoverable from any person shall be such as may be found by the Court to be just and reasonable having regard to his responsibility for the damage (r). The Court has also power to exempt any person from the liability to make contribution or to direct that the contribution to be recovered from any person shall be a complete indemnity.

#### SUB-SECTION 5.—*General exceptions to liability and defences.*

##### *Torts committed abroad. Survival of rights of action.*

**Acts of State.**—The rule that, where a tort has been committed, the wrongdoer cannot set up as a defence that the act was done by the command of the Crown, is qualified in the case of acts committed abroad against a foreigner.

If an action be brought in the British Courts in such a case it is open to the defendant to plead that the act was done by the orders of the British Government or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as an act of State of which a municipal Court cannot take cognisance (s).

Thus, in *Buron v. Denman* (t), the defendant was a British naval officer engaged on the coast of Africa in suppressing the slave trade. He made a treaty with a native king for the abolition of slavery in his kingdom and in pursuance thereof he destroyed the

(g) *Burrows v. Rhodes*, [1899] 1 Q. B., at p. 828; 68 L. J. Q. B. 545.

(r) Where A succeeds in an action brought against B and C as joint tortfeasors the trial Judge may apportion the amount of contribution; *Croston v. Vaughan*, [1938] 1 K. B. 540; 107 L. J. K. B. 182.

(s) *Johnstone v. Pedlar*, [1921] 2 A. C., at p. 271; 90 L. J. P. C. 181.

(t) 2 Ex. 167.

barracoons in which the plaintiff, a Spanish slave trader, kept his slaves, and released the slaves. His conduct was subsequently approved and ratified by the Secretaries of State for the foreign and colonial departments. *Held*, that as his acts were "acts of State" and had been so ratified by the Crown, no action in respect of them could be maintained by the plaintiff.

But the defence of "act of State" cannot be set up against a friendly alien resident in the United Kingdom (*u*). Nor can it be set up in any case in which the plaintiff is a British subject.

Thus, in *Walker v. Baird* (*u*), a naval officer had, with the authority of the Government, seized a lobster factory in Newfoundland belonging to a British subject. An action was brought against him in Newfoundland to which he pleaded that the matter of complaint was an act of State. *Held*, that in an action by a British subject for a trespass within British territory it was no answer to say that it was an act of State.

The term "act of State" includes any act which is done "not in the exercise or recognition of any legal right", but "as an exercise of sovereign power". Hence it cannot be challenged, controlled or interfered with by municipal Courts (*x*).

**Judicial acts.**—No action lies against a Judge of a superior Court of Record for anything done by him in the exercise of his judicial office, even though he acts maliciously (*y*).

The same doctrine applies also to Courts of limited jurisdiction while acting within their jurisdiction, *e.g.*, to a county court and the court of a coroner and a court-martial (*z*) and to a consular court (*a*), and, subject to the provisions of the Justices Protection Act, 1848, to justices of the peace (*b*): it also, to some extent,

(*u*) *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

(*w*) [1892] A. C. 491; 61 L. J. P. C. 92.

(*x*) *Salaman v. Secretary of State for India*, [1906] 1 K. B., at pp. 633, 639; 75 L. J. K. B. 418.

(*y*) *Scott v. Stansfield*, L. R. 3 Ex. 220; 37 L. J. Ex. 135; *Anderson v. Gorrie*, [1895] 1 Q. B. 668. As to the privilege which attaches to statements made in any judicial proceedings, see *post*, Part II, Chapter VII.

(*z*) *Miller v. Seare*, 2 Wm. Bl. 1141; *Scott v. Stansfield* (*ubi supra*).

(*a*) *Haggard v. Pelicier Freres*, [1892] A. C. 61; 61 L. J. P. C. 19.

(*b*) By s. 1 of the Justices Protection Act, 1848, it is in effect provided that no action will lie against a justice of the peace for any act done in execution of his duty as a justice with respect to any matter within his jurisdiction unless it is proved that he acted maliciously and without reasonable and probable cause. This section applies only where there has been some want of form or irregularity in the proceedings, and s. 2 of the Act expressly preserves the right of action against a justice who has exceeded his jurisdiction, see *Bullen & Leake* (3rd ed.), p. 347; *Taylor v. Nesfield*, 3 E. & B. 724; 23 L. J. M. C. 169; *Pease v. Chaytor*, 1 D. & S. 658; *Polley v. Fordham*, 91 L. T. 525; *Palmer v. Crane*, [1927] 1 K. B. 804; 96 L. J. K. B. 604.

applies to an arbitrator, who, if he acts honestly, is not liable for a mistake or error of judgment or even for negligence (c).

But if the Judge of a Court of *limited* jurisdiction does an act which is not within his jurisdiction, he has no protection if he was not misinformed as to the facts and knew or ought to have known that he had no jurisdiction (d).

The protection extends only to persons acting as a Judge or member of a "Court"; it does not therefore apply to persons exercising what are merely administrative functions, e.g., to a meeting of the London County Council for the purpose of granting music and dancing licences (e).

**Executive acts.**—An executive officer, such as a bailiff, constable, or governor of a prison, is not liable for acts done in regular execution of an apparently regular warrant or order issued by a person who has jurisdiction to do so (f). The same exemption from liability applies to acts of naval or military officers done within their jurisdiction and in the course of military or naval discipline, even though done maliciously (g). But a naval or military officer is not exempt from liability if when acting in excess of, or without jurisdiction, he does or directs to be done an act which amounts to a Common Law wrong, such as false imprisonment or assault, even though such act purports to be done in the course of actual discipline (h).

**Statutory authority.**—"No action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does

(c) *Pappa v. Rose*, L. R. 7 C. P. 525; 41 L. J. C. P. 187; *Chambers v. Goldthorpe*, [1901] 1 K. B. 624; 70 L. J. K. B. 482.

(d) *Houlden v. Smith*, 14 Q. B. 841; 19 L. J. Q. B. 170; *Caldar v. Halket*, 3 Moo. P. C. 28; 50 R. R. 1; *Willis v. McLachlan*, 1 Ex. D. 376; 45 L. J. Q. B. 689.

(e) *Royal Aquarium Society, Ltd. v. Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409.

(f) *Mayor, etc., of London v. Cox*, L. R. 2 H. L., at p. 269; 36 L. J. Ex. 225; *Henderson v. Preston*, 21 Q. B. D. 362; 57 L. J. Q. B. 607. And a constable acting under a justice's warrant is also protected by the Constables Protection Act, 1750, s. 6, notwithstanding any defect of jurisdiction, provided that he produces a copy of the warrant within six days after demand in writing.

(g) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 581; *Marks v. Frogley*, [1898] 1 Q. B. 888; 67 L. J. Q. B. 605.

(h) See *Heddon v. Evans*, 35 T. L. R. 642 (reviewing the authorities).



lie for doing that which the Legislature has authorised, if it be done negligently" (i), and the negligence has caused damage (k).

So, in *Great Central Ry. v. Hewlett* (l), a railway company erected in a public highway gate posts which in 1901 were judicially held to be an obstruction to the highway. In 1902 the company obtained an Act enabling it to "maintain" these gate posts in the highway and to renew and replace them. In 1915 a taxicab driver, while driving slowly along the highway, collided with one of the posts which he could not see owing to the diminution of street lighting in compliance with orders made under Defence of the Realm Regulations. It was held that the railway company was not liable. Its Act "merely released an obligation, namely the obligation not to obstruct the highway. From that state of facts no duty flows. If there be duty or authority to do or abstain from doing an act according to circumstances it is possible to be negligent in doing or abstaining from doing it. But if the duty or authority be simply not to do an act—merely to leave things as they are—it is impossible to be negligent in not doing anything". But liability may arise from negligence in exercising statutory powers. Thus, in *Fisher v. Ruislip-Northwood Rural District Council and Middlesex County Council* (m), it was held that where a local authority in pursuance of its statutory powers under the Civil Defence Acts, 1937 and 1939, erected an air-raid shelter on a highway, it was held that when street lighting was prohibited it was the duty of the authority to safeguard the public by special danger lights or in some other way.

The creation of what would otherwise be a nuisance is also protected if it is necessarily occasioned by the use of statutory powers.

So, in *Lagan Navigation Co. v. Lambeg Bleaching, etc., Co.* (n), it was held that no action would lie for damage caused without negligence, to adjacent landowners by works constructed by a canal company in the exercise of statutory powers.

But "the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals

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(i) *Geddis v. Proprietors of Dann Reservoir*, 3 A. C., at p. 455. With regard to reservoirs it must, however, be noted that the *Reservoirs Act*, 1930, now prescribes precautions that must be observed in the construction and alteration of reservoirs, and by s. 7 provides that where damage or injury is caused by the escape of water from a reservoir constructed after the commencement of the Act under statutory powers granted after the passing of the Act, the fact that the reservoir was so constructed shall not exonerate the undertakers from any indictment, action or other proceedings to which they would otherwise have been liable.

(k) *East Suffolk Rivers Catchment Board v. Kent*, [1941] A. C., at p. 81; 110 L. J. K. B. 252.

(l) [1916] 2 A. C. 511; 85 L. J. K. B. 1705; approving *Moore v. Lambeth Waterworks*, 17 Q. B. D. 462; 55 L. J. Q. B. 309.

(m) [1945] 1 K. B. 584; 118 L. J. K. B. 9.

(n) [1927] A. C. 226; 96 L. J. P. C. 25.

to show that by express words or by necessary implication that intention appears" (o). A distinction must therefore be drawn between statutes which authorise or imperatively direct the doing of an act which must necessarily cause an infringement of civil rights and statutes which merely give to an individual or body a power to do certain things which he or it would otherwise have no power to do, but do not authorise the exercise of the power to the prejudice of the Common Law rights of others.

Thus, in *Metropolitan Asylum District v. Hill*, the defendants, under powers given by a public statute (the Metropolitan Poor Act, 1867) had authority to erect hospitals for the poor of the Metropolis and built a small-pox hospital which was a nuisance to adjoining owners. *Held*, that they were not protected by the statute, which did not authorise a particular use of a specific building in a specified position which could not be so used without occasioning nuisance, nor imperatively direct that a building should be provided within a certain area and so used (it being an established fact that nuisance must be the result), but which was merely permissive and gave no authority to erect a hospital which was a nuisance (p).

Even when a statute is imperative or authorises a thing to be done in a particular place, the burden of proving that the result is an inevitable infringement of the rights of others lies upon the defendant (q), but "the criterion of inevitability" is not what is theoretically possible, but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and expense (r).

**Accident.**—It is a defence to show that the act complained of was due either to—

- (i) an act of God, *i.e.*, some natural cause which could not have been foreseen and guarded against by any amount of foresight and care, such as a storm of extraordinary severity, or to
- (ii) inevitable accident, that is to say, to some "external happening over which the defendant had no control" (s), so that it was not really the result of any voluntary act or omission on his part.

(o) *Metropolitan Asylum District v. Hill*, 6 A. C. 193, at p. 208; 50 L. J. Q. B. 353.

(p) Explained and distinguished in *London, Brighton and South Coast Ry. v. Truman (ubi supra)*.

(q) 6 A. C., at p. 213, and see *Manchester Corporation v. Farnworth*, [1930] A. C. 171; 99 L. J. K. B. 83.

(r) [1930] A. C., at p. 183.

(s) *Sadler v. South Staffordshire, etc., Tramways Co.*, 23 Q. B. D., at p. 21; 58 L. J. Q. B. 421.

Thus, in *Goodman v. Taylor* (t), in an action for trespass for injury done to a horse by a pony and chaise running against it, the evidence was that while the pony was being held by the bridlo, a showman came by and frightened it so that it ran away. *Held*, that this was a good defence.

But, as will be seen later, if a defendant voluntarily commits a wrongful act, it is no defence that the consequences were accidental in the sense that they were of a kind which he did not contemplate.

**Defence of person or property.**—This is usually found raised as a defence to an action of assault, but it may occur in other cases also. For instance, an owner of land on or near a river may protect himself from floods by building a barrier *on his own ground*, and, provided that he does not interfere with or obstruct the natural flow of the river, either in its ordinary bed or in any regular flood-channel, he is not responsible for any damage which he occasions to his neighbour by throwing the whole overflow upon the latter's land (a).

So, in *Gerrard v. Crowe* (a). A and B owned lands on opposite sides of a river which, when in flood, flowed over B's land, but in no definite flood channel. B constructed an embankment running diagonally from a point on his land to the river bank, so as to protect the land behind this embankment. The amount of water flowing over A's land in time of flood was consequently increased. *Held*, that A had no right of action against B.

**Volenti non fit injuria.**—It is a good defence to an action that the act complained of was done by the express or implied consent of the plaintiff, or that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it (b).

Thus as a general rule an act which would otherwise be an assault does not constitute an assault if it is done by the consent of the person upon whom it is committed. And such consent may be implied, as, for example, by participation in many games and forms of sport.

So also a person who goes to see a spectacle which in some cases may be attended by danger, as, *e.g.*, a motor race, takes the

(t) 5 C. & P. 630.

(a) *Gerrard v. Crowe*, [1921] 1 A. C. 395; 90 L. J. P. C. 42; and see *Nield v. London and North Western Ry.*, 11 R. 10 Ex. 4; 44 L. J. Ex. 15.

(b) See *Letang v. Ottawa Electric Ry.*, [1926] A. C. 725; 95 L. J. C. P. 158.

risk of such accidents as may happen although all proper precautions have been taken (c).

Thus, in *Hall v. Brooklands Auto Racing Club* (c), a spectator at a motor race meeting was injured by a car which, through touching another car in the course of a race, went through the railings separating the course from the spectators and seriously injured the plaintiff. No similar accident had ever happened on the defendants' track. The jury found that the defendants were guilty of negligence in failing to take reasonable precautions to warn spectators of, or protect them against the risks arising from, a dangerous sport. *Held*, by the Court of Appeal, (i) that in the circumstances there was no evidence upon which the jury could find that such races had become dangerous to spectators or that the accident to the plaintiff was due to any want of reasonable care on the part of the defendants towards him, and (ii) that the plaintiff (like a person going to see a cricket or golf match, at which he may accidentally be injured by a ball, or a flying meeting, in which an aeroplane may fall on his head) must have known that no barrier could be provided which would protect him against a car going through the railings and that he took the risk of so improbable an occurrence.

There may, however, be cases in which, although a plaintiff elects to run a risk, the defence of *volenti non fit injuria* cannot be set up against him.

Thus, in *Haynes v. Harwood* (d), the plaintiff was on duty (though not on point duty) in a police station situated in a crowded street. The defendants' driver had left a two-horse van unattended in the street. The horses bolted and were seen by the plaintiff, who rushed out and stopped them, but in so doing was injured. *Held* (*inter alia*), (i) that considering all the circumstances of the case the driver was negligent in leaving the horses unattended in that street, and (ii) that the maxim *Volenti non fit injuria* did not in the circumstances apply to the plaintiff since he was moved by a duty, both legal and moral and "not from any choice involving a consent to take any risk upon himself".

It must, however, be noticed that in the foregoing case the act of the plaintiff was done to rescue other persons from imminent danger of injury or death and that the Court expressly approved of the decision in *Cutler v. United Dairies, Ltd.* (e), in which the maxim *volenti non fit injuria* was held to apply to a plaintiff who was injured while, at the request of the defendants' servant, he was attempting to assist in holding a restive horse. And it was also pointed out that the mere fact that a spectator runs out into

(c) See *Hall v. Brooklands Auto Racing Club*, [1933] 1 K. B. 205; 101 L. J. K. B. 678.

(d) [1935] 1 K. B. 146; 104 L. J. K. B. 68. See also [1934] 1 K. B., at pp. 251, 252.

(e) [1938] 2 K. B. 297; 102 L. J. K. B. 668.

the road to stop a runaway horse will not necessarily entitle him to maintain an action for the consequential damage. All the circumstances must be considered.

In the case of *Dann v. Hamilton* (f), a distinction was drawn between cases "where a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof", and cases where "the act of the plaintiff relied on as a consent precedes, and is claimed to license in advance, a possible subsequent act of the defendant". It was accordingly held that the plea of *volenti non fit injuria* could not be set up against a person who, not acting under the pressure of any legal or social duty, or any necessity, voluntarily travelled in a motor car, knowing that the driver was very much under the influence of drink, and, as a consequence, was injured by a collision caused by his drunkenness. In the particular case it was, however, found as a fact that the drunkenness of the driver was not so extreme and glaring that to accept a lift from him was like engaging in an intrinsically and obviously dangerous occupation. But the question whether in such a case the maxim "*volenti non fit injuria*" would apply, was left open. It may, however, be appropriate to cite the words of Bowen, L.J., in *Thomas v. Quartermain* (g), approved in *Letang v. Ottawa Electric Ry.* (h), "The maxim, be it observed, is not '*scienti*' *non fit injuria*, but '*volenti*'. It is plain that mere knowledge may not be a conclusive defence . . . . But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete".

In the case of *Bowater v. Rowley Regis Corporation* (i) it has been pointed out that the maxim "*volenti non fit injuria*" must be applied with extreme caution in the case of a master and servant, and "can hardly ever be applicable when the act to which the servant is said to be '*volens*' arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved", as in the case of a man employed in an explosives factory or a horse-breaker, who must take the risks incident to his employment. But, where a man whose occupation is not of a nature inherently dangerous is asked or required to undertake a risky operation, the master, in order to rely on the maxim, must show that the servant agreed that what risk there was should be on him.

**Parental or quasi parental authority.**—A father, and on the death of the father, a mother, has at Common Law the right to the custody and control of a child until it attains twenty-one and may inflict upon it any reasonable restraint or punishment (k).

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(f) [1939] 1 K. B. 509; 108 L. J. K. B. 255.

(g) 18 Q. R. D., at pp. 696, 697.

(h) *Ante*, p. 272.

(i) [1944] K. B. 476.

(k) *Cleary v. Booth*, [1898] 1 Q. B. 465; 62 L. J. M. C. 87.

A schoolmaster has delegated to him the same powers so far as is necessary for the welfare of the child and the maintenance of reasonable rules of discipline (l). And this power of the schoolmaster is not limited to acts committed upon the school premises, so that he may punish a pupil for doing in public an act which is forbidden by a reasonable rule of the school (m).

It has also been suggested that the "claims of relationship or guardianship" may constitute a defence to an action for inducing a breach of contract where they "demand an interference amounting to protection" (n).

"By the Common Law also a similar power of moderate chastisement is given to the captain of a ship as there is to a parent and schoolmaster" (o).

Release, or accord and satisfaction, may also constitute defences to an action of tort (p).

**Discharge in bankruptcy.**—An order of discharge in bankruptcy releases a bankrupt from liabilities provable in bankruptcy (q). Claims for unliquidated damages for tort are not, however, provable in bankruptcy (r).

**Statutes of Limitation.**—By the *Limitation Act, 1939*, the period of limitation for all actions of tort is *six years* (s), except—

A. In cases within the *Public Authorities Protection Act, 1898* (*infra*), when it is *one year* from the date on which the cause of action accrued (t).

B. In cases in which a different period of limitation is prescribed by any other enactment (u), e.g.,

(l) *R. v. Hopley*, 2 F. & F. 202; *Fitzgerald v. Northcote*, 4 F. & F. 656.

(m) *Cleary v. Booth* (*ubi supra*); *R. v. Newport (Salop) Justices*, [1929] 2 K. B. 416; 98 L. J. K. B. 555.

(n) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; 74 L. J. K. B. 525.

(o) *Murray v. Moutrie*, 6 C. & P., at p. 473, and see *Lamb v. Barnett*, 1 C. & J. 291.

(p) See *ante*, p. 226; see also *Boosey v. Wood*, 3 H. & C. 484; 34 L. J. Ex. 65; 140 R. R. 565; *Read v. Great Eastern Ry.*, L. R. 3 Q. B. 555; 37 L. J. Q. B. 278.

(q) Bankruptcy Act, 1914, s. 28 (2). See, however, s. 28 (1) as to liability under a judgment for seduction, from which the bankrupt is not entirely released by discharge.

(r) *Id.*, s. 80 (1).

(s) Limitation Act, 1939, s. 2 (1) (a).

(t) Limitation Act, 1939, s. 21.

(u) *Id.*, s. 32.

- (i) in actions for the *infringement of copyright*, when it is *three years* (x);
- (ii) in actions under *Lord Campbell's (Fatal Accidents) Act*, when it is *one year from the death of the deceased* (y);
- (iii) in actions within s. 8 of the *Maritime Conventions Act, 1911*, i.e., actions for loss or damage to a vessel, her cargo or freight, or any property on board, or for loss of life or personal injury to a person on board a vessel owing to a collision caused by the fault of another vessel, when it is *two years*;
- (iv) in actions for damages against a carrier by air, when it is *two years from the date of the arrival of the aircraft at its destination, or from the date when it ought to have arrived, or from the date on which the carriage stopped* (a);
- (v) in actions which, under the *Law Reform (Miscellaneous Provisions) Act, 1934*, survived against the estate of a deceased tortfeasor, when it is *six months from the date when his personal representative took out representation* (b).

If special damage is the gist of the action the period was from the date when the damage was incurred (c). But if the action is for the infringement of an absolute right, the period runs from the date of the infringement, and, in the case of a continuing tort, such as a continuing trespass, from the date of its last occurrence. With regard, however, to actions for the conversion or detention of a chattel it is provided by s. 1 (1) of the *Limitation Act, 1939*, that when any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of it, a further conversion or detention of the chattel takes place, the right of action both in respect of the original or such further conversion or detention is barred after six years from the accrual of the *original* cause of action. And by s. 31 (2) it is also provided that where any such cause

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(x) Copyright Act, 1911, s. 10. This section applies also to actions for the recovery of infringing copies which are deemed to be the property of the owner of the copyright, or for damages for their conversion: *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co.*, [1939] A. C. 178; 108 L. J. Ch. 5.

(y) Fatal Accidents Act, 1846, s. 3.

(a) Carriage by Air Act, 1932, Sched. 1, Art. 29.

(b) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (3) (b).

(c) See *Backhouse v. Donomi*, 9 H. L. C. 508; 34 L. J. Q. B. 181; *Darley Main Colliery Co. v. Mitchell*, 11 A. C. 127; 55 L. J. Q. B. 529.

of action has accrued to any person and the period for bringing an action has expired and he has not during that period recovered possession of the chattel, *his title to the chattel shall be extinguished.*

**Disabilities and fraud.**—The provisions of the Limitation Act as to disabilities and fraud (*d*) apply generally to actions of tort as well as to actions of contract, except, so far as concerns disabilities, in actions against public authorities.

**Actions against public authorities.**—By s. 1 of the *Public Authorities Protection Act*, 1898, it was provided that where any action or other proceeding is commenced against any person—

- (i) for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or
  - (ii) in respect of any alleged neglect or default in the execution of any such act, duty or authority,
- the action shall not lie unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within six months after the ceasing thereof.

By s. 21 (1) of the *Limitation Act*, 1939, the foregoing periods of six months have been extended to "one year from the date on which the cause of action accrued; provided that, where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued until the act, neglect or default has ceased". But by a proviso to s. 82 of the Act this section does not apply to any action in which a longer period is prescribed by another enactment. And the *Public Authorities Protection Act* and the foregoing provisions of the *Limitation Act*, 1939, do not apply to proceedings against the Coal Board, the British Transport Commission or an Electricity Board in respect of any act, neglect or default done or omitted by its servant or agent in his capacity as such: and in their application to any such action ss. 2 and 3 of the *Limitation Act*, 1939, have effect with the substitution of three years for six years (*e*).

By s. 22 (d) of the *Limitation Act*, 1939, it is provided that in such actions the disability of infancy or unsound mind cannot

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(d) *Ante*, pp. 229, 231; cf. *Bull's Coal Mining Co. v. Osborne*, [1899] A. C. 351; 68 L. J. P. C. 49. *Beaman v. A.R.T.S.*, [1949] 1 K. B. 550.

(e) *Coal Industry Nationalisation Act*, 1946, s. 49; *Transport Act*, 1947, s. 11; *Electricity Act*, 1947, s. 12.



be set up unless the plaintiff proves that the person under such disability was not, at the time when the right of action accrued to him, in the custody of a parent (f).

By the expressions "public duty" and "public authority" are meant "a duty owed to all the public alike or an authority exercised impartially with regard to all the public" (g). The protection which is given by the Public Authorities Protection Act does not, therefore, apply to acts done in pursuance of a private contract made by a public authority which was under no public obligation to make such a contract although it had power to do so.

Thus, in *Bradford Corporation v. Myers* (h), the defendants were authorised to carry on the undertaking of a gas company and were under a public duty to supply gas. They also had power to sell their coke. They contracted to sell a ton of coke to the plaintiff and by the negligence of their agent part of the coke was precipitated through a window in the plaintiff's shop. *Held*, that the defendants were not protected by the Act, because the negligence complained of was merely a neglect or default in the discharge of a private duty due to one individual and arising out of a contract made with him.

Nor does the Act protect an independent contractor doing under contract, and for his own profit, works which a public body is authorised to do (i) or acting under a contract with a highway authority (k). Nor does the Act apply to acts done from a desire to injure the plaintiff or any motive "other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority" (l).

(f) By s. 31 (1) the term "parent" has the same meaning as in the Fatal Accidents Act, 1846, as extended by s. 2 of the Law Reform (Miscellaneous Provisions) Act, 1934. See *post*, p. 280.

(g) *Bradford Corporation v. Myers*, [1916] 1 A. C. 242, at p. 247; 85 L. J. K. B. 416; *Griffiths v. Smith*, [1941] A. C., at p. 177; 110 L. J. K. B. 156.

(h) *Ubi supra*. Compare *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291; 91 L. J. K. B. 210; *Swain v. Southern Ry.*, [1936] 2 K. B. 560; 108 L. J. K. B. 827.

(i) *Tilling, Ltd. v. Dick, Kerr & Co., Ltd.*, [1905] 1 K. B. 562; 74 L. J. K. B. 359.

(k) *Drake v. Bedfordshire County Council*, [1944] 1 K. B. 620; 113 L. J. K. B. 328.

(l) *Scammell & Nephew, Ltd. v. Hanley*, [1929] 1 K. B., at p. 427; 98 L. J. K. B. 98.

"In my view it is at least doubtful whether the Act protects a public officer, who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute. On the other hand, if a public officer makes an honest mistake of fact and does that which it would be his duty to do if his view of the facts were correct, he is, in my judgment, acting in intended execution of a duty": *Betts v. Receiver for the Metropolitan Police District*, [1932] 2 K. B. 595, at p. 602; 101 L. J. K. B. 588.

A duty founded on the public position of the defendant is a public duty, as, *e.g.*, the duty of an officer of the police force to hand over to their true owner goods of which he has become possessed in the course of performing his duties to the public (*m*).

The Act applies to servants of the Crown acting within the scope of their public duties (*n*). It also applies to officers or servants of a public authority who, on behalf of that authority, are performing a public duty which must be performed by an officer or servant as, *e.g.*, to medical officers acting on behalf of a County Council in pursuance of a public duty imposed upon it (*o*).

*Special defence under the Act.*—It is provided by the Act that in any action for damages that comes under its provisions the defendant may, in lieu of or addition to any other defence, plead a *tender of amends*, and if the action is commenced after such a tender and the plaintiff does not recover more than the amount tendered, the defendant will be entitled to the subsequent costs of the action, to be taxed as between solicitor and client (*p*).

*Torts committed abroad.*—No action can be maintained in this country for a tort committed outside the jurisdiction unless two conditions are fulfilled: "First the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done" (*q*). But it is not necessary that the act should be the subject of *civil* proceedings in the foreign country; it is sufficient that it is punishable by criminal proceedings (*r*). And the fact that in the foreign country civil proceedings must be preceded by criminal proceedings does not affect the right to sue in England, being merely a matter of procedure (*s*). The Courts of this country have, however, no jurisdiction to entertain an action to recover damages for a trespass to land situate in a foreign country (*t*).

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(*m*) *Betts v. Receiver for the Metropolitan Police District* (*ubi supra*).

(*n*) *The Danube II*, [1921] P. 188; 90 L. J. P. 814.

(*o*) *Nelson v. Cookson*, [1940] 1 K. B. 100; 109 L. J. K. B. 154.

(*p*) *I.e.*, on a higher scale than is usually allowed. This provision has been held to apply to a *quia timet* action: *Graigola Merthyr Co. v. Swansea Corporation*, [1928] A. C. 344; 98 L. J. Ch. 288.

(*q*) *Phillips v. Byre*, L. R. 6 Q. B., at p. 28; 40 L. J. Q. B. 28; *Machado v. Fontes*, [1897] 2 Q. B., at p. 233; 66 L. J. Q. B. 542; *Walpole v. Canadian Northern Ry.*, [1928] A. C. 118; 92 L. J. P. C. 89.

(*r*) *Machado v. Fontes* (*ubi supra*).

(*s*) *Scott v. Lord Seymour*, 1 H. & C. 219; 32 L. J. Ex. 61.

(*t*) *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604.

**Survival of rights of action.**—At Common Law no right of action for a tort survived to the estate of a deceased person, and no right of action survived against his estate except when he had in his lifetime appropriated property or the value or proceeds of property belonging to the plaintiff (*u*). To this general rule some statutory exceptions were created. And, under the Fatal Accidents Acts (*x*) compensation may be obtained by the dependants of a deceased person for loss suffered through his death.

Apart from these cases in which statutory compensation is obtainable the law as to the survival of a right of action for a tort is now contained in the *Law Reform (Miscellaneous Provisions) Act, 1984*.

By s. 1 of this Act it is provided that on the death of any person after the commencement of the Act (*a*) all causes of action *subsisting against or vested in him* shall survive against, or for the benefit of, his estate *except* causes of action for *defamation, seduction, inducing one spouse to leave or remain apart from the other*, and claims under s. 189 of the Supreme Court of Judicature Act for damages for adultery.

Where a cause of action survives *for the benefit of the estate of a deceased person*, the damages recoverable for the benefit of his estate may not include any exemplary damages (*b*), and, where his death has been caused by the act or omission which gives rise to the cause of action, must be calculated without reference to any loss or gain *to his estate* consequent on his death, except that a sum in respect of funeral expenses may be included.

In an action under this Act the cause of action which survives may give rise to a claim for loss of expectation of life. A plaintiff who is still alive has always been able to obtain damages for a loss of expectation of life through a tort committed by the defendant (*c*). In the case of *Rose v. Ford* (*d*) it was settled that under the Law Reform Act, 1934, this right passes to the personal representatives of a person who has thus lost his life. And it has also been decided that this rule applies even though the injured person died instantaneously (*e*). In the case of *Rose v. Ford* no question arose as to the amount of damages to be awarded for loss of expectation of life. Since that case many Judges have expressed their difficulties in arriving at any decision on this

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(*u*) *Phillips v. Homfray*, 24 Ch. D. 439; 52 L. J. Ch. 833.

(*x*) *Post*, p. 287.

(*a*) July 25, 1931.

(*b*) See *post*, p. 283.

(*c*) See *Rose v. Ford*, [1937] A. C., at pp. 833, 834.

(*d*) [1937] A. C. 826; 106 L. J. K. B. 596.

(*e*) *Morgan v. Scoulding*, [1938] 1 K. B. 786; 107 L. J. K. B. 299.

point, and the amounts awarded by Judges and by juries have varied enormously. In the later case of *Benham v. Gambling* (f) damages given in respect of the death of a child of two and a half years, who was rendered unconscious by a motor collision and died on the following day without recovering consciousness, were reduced by the House of Lords from £1,200, the sum fixed by the Judge at the trial, to £300. In this case the principles to be observed in awarding damages for loss of expectation of life were discussed by the Lord Chancellor who pointed out *inter alia* that, while the age of the individual may be a relevant factor, the damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost. "The question . . . resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. . . . If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award." Again, "special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury or at any rate as inflicting the same injury as in more normal cases". Moreover, "the question is not whether the deceased had the capacity or ability to appreciate that his future life on earth would bring him happiness; the test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects", and there is no reason why the sum to be awarded should vary according to the social position or prospects of worldly success of the victim (g).

No proceedings are maintainable in respect of a cause of action in tort which by virtue of this section has survived *against the estate of a deceased person*, unless either—

- (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
- (b) the cause of action arose not earlier than six months before his death and proceedings are taken not later than six months after his personal representative took out representation.

The rights of action conferred by this Act for the benefit of the estates of deceased persons are in addition to any rights of action conferred on the dependants of deceased persons by the Fatal Accidents Acts and the Carriage by Air Act, 1922, but any

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(f) [1941] A. C. 157; 110 L. J. K. B. 49.

(g) [1941] A. C., at pp. 166, 167.

damages recoverable under this Act must be taken into account in assessing damages under those Acts (h).

### SECTION 2.—*Remedies for Torts*

The Common Law remedies for torts were both extra-judicial and judicial. The former class includes the remedies of expulsion of a trespasser, recaption of goods wrongfully taken, distress damage feasant, and abatement of nuisances, which will be considered later. The only judicial remedy at Common Law was an action of damages; in Equity, however, the remedy of an injunction might be granted: a statutory remedy was also given by the Fatal Accidents Act, 1846.

1. **Damages.**—In cases of tort, as in cases of breach of contract, the assessment of damages is, as a general rule, governed by the principle of compensation for the injury and loss sustained by the plaintiff.

Thus, the plaintiffs were the owners of a dredger which they were using under a contract to do work in a foreign harbour and which was sunk by the defendant's steamship. *Held*, that the measure of damages was the value of the dredger at the date of the loss with interest from that time until payment, and that this must be assessed by taking into account (i) the market price of a comparable dredger, (ii) costs of adaptation for the work and transport to the foreign harbour and insurance, (iii) compensation for disturbance and loss in carrying out the contract over the period of delay before the substituted dredger could be available for the work, including overhead charges and expenses of staff, equipment and so forth thrown away, but *Held* also, that no damages could be given in respect of loss which had been caused to the plaintiffs from the fact that, owing to their own weak financial position, they had been unable to buy another dredger and had been compelled to hire a dredger on exceedingly expensive terms (i).

Again in an action for damages for personal injuries caused by the negligence of the defendant the plaintiff, "besides a reasonable sum for the pain and suffering he has endured, and the expense he has incurred for medical and other necessary attendance during the period of his illness, has always been allowed to recover a fair recompense for the loss of profits of his profession

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(h) *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] A. C. 601; 111 L. J. K. B. 418.

(i) *Laeshoch Dredger (Owners of) v. Owners of S.S. Edison*, [1938] A. C. 449; 102 L. J. P. 73.

or business during his enforced absence from it, whether temporary or presumably permanent" (k). And the fact that the plaintiff has through an insurance received compensation for his accident cannot be set up by the defendant in mitigation of damages (l).

It is now also settled that damages can be recovered not only for immediate physical injuries, but for injuries resulting from nervous shock directly caused by the defendant's tort, whether such shock was due to the plaintiff's fear for his own safety or to his fear for the safety of a member of his family (m).

Thus, in *Hambrook v. Stokes* (n), the defendant's servant left a motor lorry unattended and with its engine running at the top of a steep hill. The lorry ran away down the hill, in the course of which there was a bend. The plaintiff's wife saw the lorry rushing down hill towards her and became frightened for the safety of her children, who were out of her sight round the bend and in the course of the lorry. She was informed by bystanders that a child answering to the description of one of hers had been injured. In consequence of her fright she suffered a nervous shock which caused her death. In an action by the plaintiff under the Fatal Accidents Act, it was held that he was entitled to recover although the shock to his wife was caused by fear, not for her own safety, but for that of her children.

But, as will be seen later, damages for nervous shock caused by the negligence of the defendant can be recovered only where the plaintiff is a person to whom the defendant is under a duty to take care (o).

In tort, moreover, there are many cases in which, from the nature of the wrong, or the person by whom or to whom it was done, or the manner in which it was done, the jury may award *vindictive or exemplary damages*, that is to say, damages over and above compensation for the actual injury or loss. Where, for example, "a wrongful act is accompanied by words of

(k) *Phillips v. London and South Western Ry.*, 5 C. P. D., at p. 284; 49 L. J. C. P. 233. In this case the jury at the first trial awarded to the plaintiff, who was a physician of eminence, the sum of £7,000 as damages, and a new trial was directed by the Court of Appeal (5 Q. B. D. 78; affirming the decision of the Queen's Bench Division: 4 Q. B. D. 406) on the ground that the jury had failed to take into account all the heads of damage. At the second trial the jury awarded £16,000, and an appeal on the ground that the damages were excessive was unsuccessful. The various judgments contain very full discussions of the principles applicable. See also *Johnston v. Great Western Ry.*, [1904] 2 K. B. 250; 73 L. J. K. B. 568.

(l) *Bradburn v. Great Western Ry.*, L. R. 10 Ex. 1; 44 L. J. Ex. 9.

(m) *Wilkinson v. Downton* (ante, p. 253); *Hambrook v. Stokes*, [1925] 1 K. B. 141; 94 L. J. K. B. 435; *Hay (or Bourhill) v. Young*, [1943] A. C., at p. 111.

(n) *Ubi supra*.

(o) *Hay (or Bourhill) v. Young*, [1943] A. C. 92.

contumely and abuse, the jury are warranted in taking that into consideration " (p).

Thus, in *Merest v. Harvey* (q), where the defendant, who was a magistrate, after being requested not to trespass upon the plaintiff's land, continued to do so and endeavoured to join the plaintiff's shooting party, and shot the plaintiff's birds, and used offensive language, it was held that the jury were justified in assessing damages at £500.

Vindictive damages are accordingly frequently awarded, not only for trespass, but in actions for assault, false imprisonment, malicious prosecution, seduction, libel, and slander.

*Remoteness of damage.*—In determining the extent of the consequences for which a defendant is liable in an action of tort, no question arises, as it does in cases of breach of contract, as to whether the damages were "probable", in the sense of being such as he ought to have contemplated (r). The only ground of remoteness is therefore the absence of sufficient causal connection between the tort and the damage (s).

"In tort a defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act" (t).

"Remoteness as a legal ground for the exclusion of damage in an action of tort means . . . the absence of direct and natural causal sequence" (u).

"What a defendant ought to have contemplated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, want of due care according to the circumstances: this, however, goes to culpability, not to compensation. . . . *Remoteness of damage is a question of cause and effect*" (x).

(p) *Bell v. Midland Ry.*, 10 C. B. (n.s.), at p. 308; 30 L. J. C. P. 278.

(q) 5 Taunt. 231; 15 R. R. 548.

(r) *Ante*, p. 239. See also *The Arpad*, [1934] P., at p. 232; 103 L. J. P. 129.

(s) *Ante*, p. 241.

(t) *Sneesby v. Lancashire and Yorkshire Ry.*, L. R. 9 Q. B., at p. 268; affirmed, 1 Q. B. D. 42; 45 L. J. Q. B. 1.

(u) *Dulieu v. White*, [1901] 2 K. B., at p. 678.

(x) Per Lord Sumner, in *Weld-Blundell v. Stephens*, [1920] A. C., at pp. 984, 988; 89 L. J. K. B. 705; approving *Blyth v. Birmingham Waterworks*, 11 Ex. 781; and the judgment of Blackburn, J., in *Smith v. London and South Western Ry.*, L. R. 6 C. P., at p. 21; 40 L. J. C. P. 21. In the last-mentioned case, Channell, B., said: "I quite agree that . . . the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when once it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Blackburn, J., said: "I also agree that what the defendants might reasonably anticipate is . . . only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." See also the judgment of Scrutton, L.J., in *Re Polemis*

"In cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby looking man in the street and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on; or you negligently injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice" (y).

But a defendant is not liable for damages with which his wrongful act has no causal connection.

Thus, in the case *Glover v. London and South Western Ry.*, the defendants wrongfully, but without unnecessary violence, removed the plaintiff from a railway carriage. The plaintiff brought an action for assault, and claimed as special damage the value of some raceglasses which he left in the carriage. There was, however, no evidence that the plaintiff was prevented from taking his glasses with him, and it was therefore held that this damage was too remote, not being due to any act of the defendants, but to the plaintiff's own negligence (z).

If, however, there is a continuing causal connection between his wrongful act and the damage the defendant will be liable although the damage would not have resulted but for some intervening circumstances over which he had no control, or even the act of a third person.

Thus, in the case of *Scott v. Shepherd*, the defendant threw a lighted squib into a market-house, where it fell upon the stand of one Yates. One Willis, to prevent injury to himself and the wares of Yates, threw the squib across the market-house, where it fell upon the stand of one Ryal, who in turn, in order to save himself and his wares, picked it up and threw it away, but hit the plaintiff and put out one of his eyes. It was held that the defendant, having given the first mischievous impulse to the squib, was answerable in trespass for all the consequential damages. "If a man turns out a mad bull, ox, or any other wild or mischievous beast towards A, who turns the brute towards B, who turns it again towards C, whom it hurts, he who was the first actor and turned out the beast is answerable in trespass *vi et armis* for the injury" (a).

Again, in *Sneesby v. Lancashire and Yorkshire Ry. (b)*, cattle and *Furness, Withy & Co.*, [1921] 3 K. B., at p. 575; 90 L. J. K. B. 1853, where the same rule is repeated and disapproval is expressed of the common expression "natural and probable result".

(y) *Per* Scrutton, L.J., in *The Arpad*, [1984] P., at p. 202; 103 L. J. P. 129. The reference to "notice" is due to the fact that the rule in torts is being compared with the rule in contracts.

(z) L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; 17 L. T. 139. But it would have been otherwise if a watch or purse had been forcibly shaken from the plaintiff's person and so lost (*id.*).

(a) (1773), 2 W. Bl. 892. See also *H.M.S. London*, [1914] P., at p. 81; 83 L. J. P. 74.

(b) 1 Q. B. D. 42; 45 L. J. Q. B. 1.



which were being carried by the defendants were frightened by the defendants' servants at 11 p.m. and ran away. At 3 a.m. the next morning some of the cattle were found injured on the railway line on to which they had got by going for some distance along a road and breaking through a defective fence. This fence separated the road from an orchard belonging to the defendants but let to a tenant who was under an obligation to repair the fence. *Held*, that the defendants were responsible because everything which happened was due to the loss of control over the cattle caused by their fright, and that it was no answer to say that if the fence had not been defective the accident would not have happened.

Again, in *Harris v. Mobbs* (c), the proprietor of a ploughing apparatus left it by the side of the road. The plaintiff's mare shied at it, galloped kicking for 140 yards, got her leg over the shaft and fell, kicking the driver. *Held*, that the van proprietor was liable. "Though the immediate cause of the accident was the kicking of the mare, still the unauthorised and dangerous appearance of the van and plough on the side of the road was . . . the proximate cause of the accident."

If, however, the damage was caused by the "conscious act of another volition" (d), not induced by the act of the defendant, it is too remote to be recoverable, although it could not have happened but for his original wrongful act.

Thus, in the case of *Weld-Blundell v. Stephens* (e), A, having employed B to investigate the affairs of a company, wrote to B a letter containing libellous statements concerning two officials of the company. B handed the letter to his partner, who accidentally dropped it at the company's office; the manager of the company picked it up and showed it to the two officials, who brought actions for libel against A and recovered damages. A then brought an action against B, in which he claimed to recover the amount of such damages; but it was held that this damage was too remote to be recoverable, the negligence of B having been merely an occasion and not the cause of the act of the manager, which was a *novus actus interveniens* (f).

Again, in *Donovan v. Union Cartage Co.* (g), the defendants left an unhorsed van standing outside their premises. A child of seven climbed on the van and fell from it, thereby suffering injuries. *Held*, even assuming the van to be a nuisance, the accident did not happen because it was a nuisance, but because the child trespassed upon it.

Again, in *Harnett v. Bond*, it was held that A, who had without sufficient care taken action by which the plaintiff was improperly detained as a lunatic, was not responsible for his subsequent detention in various institutions by B, C, and D, whose duty it was to

(c) 3 Ex. D. 268.

(d) *Dominion Natural Gas Co. v. Colusa & Perkins*, [1909] A. C., at p. 646.

(e) [1920] A. C. 956; 89 L. J. K. B. 705.

(f) [1920] A. C., at p. 981.

(g) [1938] 2 K. B. 71; 102 L. J. K. B. 270.

decide whether his detention was necessary, and who had in fact on various occasions formed decisions that it was necessary, with the result that each decision was a *novus actus interveniens* (h).

There are, however, certain cases in which a defendant is liable even for the independent acts of third persons, as, e.g., where he exposes to the interference of others a thing which is in itself dangerous. But in such cases his liability arises from the breach of the special duty not to expose dangerous things so as to enable strangers to make them a source of injury to persons brought into contact with them. The question of remoteness of damage does not therefore arise, because the special duty increases the original liability of the defendant and makes him responsible for the acts of strangers as if they were his own acts (*post*, Part II, Chapter III).

**Damages under the Fatal Accidents Acts.**—The Common Law does not recognise the death of a person as giving a claim for damages (i). Thus a master cannot maintain an action for injuries which cause the death of his servant, and a father cannot maintain an action for the funeral expenses of a child whose death was caused by the negligence of the defendant (k). But, by the *Fatal Accidents Act*, 1846 (*Lord Campbell's Act*), a right to compensation was given to the families of persons killed by torts. This Act gives a new cause of action beyond that which the deceased would have had if he had survived, and based on a different principle (l).

By s. 1 of the Act: "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every

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(h) [1925] A. C. 669; 94 L. J. K. B. 569. See also *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. 16; 95 L. J. P. 185; *Cutler v. United Dairies*, [1938] 2 K. B. 297; 102 L. J. K. B. 663 (*ante*, p. 279).

(i) *Rose v. Ford*, [1937] A. C., at p. 832. For a full explanation, see *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38; 86 L. J. P. 58.

(k) *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648; 75 L. J. K. B. 907. But this rule does not apply where independently of the wrong causing the death there is a cause of action such as a breach of contract, and where the damage arising from the death is merely one of the elements of damage. Thus, where tinned salmon sold to the plaintiff was not fit for human food and caused the death of his wife, it was held, in an action brought by him for breach of the warranty implied by s. 14 (1) of the Sale of Goods Act, 1893, that he was entitled to claim (*inter alia*) for the loss of his wife's services: *Jackson v. Watson*, [1909] 2 K. B. 198; 78 L. J. K. B. 587.

(l) See *British Electric Ry. v. Gentile*, [1914] A. C., at p. 1040; 83 L. J. P. C. 353.

uch case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony" (m).

By s. 2: "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct".

By s. 8, it is provided that "not more than one action shall lie for and in respect of the same subject-matter of complaint", and that "every such action shall be commenced within twelve calendar months after the death" (n).

By s. 4, the plaintiff must deliver to the defendant, or his solicitor, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

By s. 5 the term "parent" includes father, mother, grandfather, grandmother, stepfather, and stepmother, and the term "child" includes son, daughter, grandson, granddaughter, stepson, and stepdaughter. And by s. 2 of the *Law Reform (Miscellaneous Provisions) Act, 1934*, a person is to be deemed the "parent" or "child" of the deceased person although only related to him illegitimately or in consequence of adoption, provided that the adoption was in pursuance of an adoption order made under the Adoption Act, 1950 (o) (England and Scotland), or the Adoption of Children Act, 1929 (Northern Ireland). The term "child" has also been held to include a child *en ventre sa mère*.

By s. 1 of the *Fatal Accidents Act, 1864*, if there is no executor or administrator of the deceased, or if the action is not brought by such executor or administrator within six calendar months after the death, then it may be brought in the

(m) See *ante*, p. 248

(n) If against a ship or its owners, the action can now be brought within two years, by s. 8 of the Maritime Conventions Act, 1911: see *The Caliph*, [1912] 213, 82 L. J. P. 27

(o) 14 Geo. 6, c. 26

name or names of all or any of the persons for whose benefit the executor or administrator would have sued (p).

Although, however, there is a new cause of action, yet no action can be maintained unless the deceased at the moment of death could have successfully maintained an action. No action can therefore be brought if the defendant, by the terms of some special contract, was exempted from liability (q), or if the deceased had already brought an action and recovered damages, or his right of action had been discharged by the receipt of some compensation in satisfaction thereof, or by the expiry of a period of limitation (r), as, e.g., in cases within the Public Authorities Protection Act, 1898, at the end of six months from the date of the wrong (s).

But the *amount* of damages recoverable by the dependants of the deceased is not estimated on the same basis as the amount of damages which might have been recovered by the deceased. Accordingly, where a passenger by railway is travelling with a ticket by which the liability of the railway company is limited to a certain amount, and is killed by the negligence of the company's servants, the damages recoverable by his dependants are not limited to that amount (t).

*Assessment of damages.*—The damage "should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life" (u).

It is not sufficient to prove a mere speculative possibility of pecuniary benefit: a father cannot, for instance, claim in respect of the death of a son of five years of age (a). And if

(p) It has been held that an action can, under this provision, be maintained by any of such persons, though brought within six calendar months of the death, if there be at the time no executor or administrator of the deceased. *Holleran v Bagnall*, 4 L. R. Ir. 740.

(q) *Haigh v Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 840; 49 L. T. 802 (special contract between a steamship company and a passenger, exempting the former from liability for injuries caused by the negligence of its servants).

(r) *British Electric Ry. v. Gentile* (*ubi supra*).

(s) *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K. B. 804; 74 L. J. K. B. 481. As to the Act, see *ante*, p. 277. But since the cause of action under Lord Campbell's Act is a new cause of action, if, in cases within the Public Authorities Protection Act, the period of six months had not elapsed at the death of the deceased, so that he had not then forfeited his right of action, the latter Act does not apply so as to bar an action not brought within six months from the date of the wrong. *British Electric Ry. v. Gentile* (*ubi supra*); *Venn v. Tedesco*, [1926] 2 K. B. 227; 95 L. J. K. B. 866.

(t) *Nunan v. Southern Ry.*, [1924] 1 K. B. 223; 93 L. J. K. B. 140.

(u) *Franklin v. South Eastern Ry.*, 117 R. R. 658; 3 H. & N. 211. See also the summary of the existing decisions by Scrutton, L.J., in *Baker v Dalgleish, etc., Co.* (*infra*).

(a) *Barnett v. Cohen*, [1921] 2 K. B. 461; 90 L. J. K. B. 1307.

a man has no means of his own and does not earn his own living, it is obvious that his wife and children cannot be pecuniary losers by his death (b).

"But all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues": a father may, therefore, recover damages for the death of his daughter without showing that she had ever yet contributed to his support or had even begun to earn any wages (c).

Only pecuniary loss can be taken into consideration by the jury, not the grief or mental sufferings of the family (d). But pecuniary loss is not limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, but includes the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of them being rendered freely in the future but for the death (e). Thus when an action is brought in respect of the death of a wife her husband can recover the cost of employing a housekeeper and of the extra expenses of management of his household occasioned by the loss of her services (c).

And, by s. 2 (8) of the *Law of Reform (Miscellaneous Provisions) Act, 1984*, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought (f).

It was formerly held that if the deceased was insured the jury, in assessing damages, must take into account the amount of the policy, but now, by s. 1 of the *Fatal Accidents Act, 1908*, it is provided that the jury must not take into account "any sum paid or payable on the death of the deceased under any contract of assurance or insurance". But, as a general rule, the fact that the plaintiff is, in consequence of the death, in receipt of a pension from the Crown, ought to be taken into consideration, although the grant or continuance of the pension is entirely in the discretion of the Crown, and it is not paid under any legal obligation (g). By s. 2 (5) of the *Law Reform*

(b) *Grand Trunk Railway of Canada v Jennings*, 13 A. C., at p. 804; 78 L. J. P. C. 1.

(c) *Taff Vale Ry v Jenkins*, [1913] A. C., at p. 7, 82 L. J. K. B. 49.

(d) *Blake v. Midland Ry*, 18 Q. B. 93, 21 L. J. Q. B. 233, 88 R. R. 543.

(e) *Berly v. Humm & Co*, [1915] 1 K. B. 627; 84 L. J. K. B. 918.

(f) Before the Act it was held that funeral expenses did not constitute pecuniary loss.

(g) *Baker v. Dalgleish Steam Shipping Co*, [1922] 1 K. B. 361; 91 L. J. K. B. 392, 126 L. T. 432, 38 T. L. R. 215. See also *Bishop v. Cunard White Star*, [1950] W. N. 185. Where, however, the pension is recovered under the

(*Personal Injuries*) Act, 1948, it is, however, provided that, in assessing damages in any action under the Fatal Accidents Acts, or the Carriage by Air Act, 1932, there shall not be taken into account any right to benefit under the National Insurance Acts, 1946, resulting from that person's death.

By the *Second Schedule* to the *Carriage by Air Act*, 1932, provisions similar to those of the Fatal Accidents Acts have been made with regard to the liability of a carrier by air in the event of the death of a passenger in international carriage. The Schedule provides that

1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

The expression "member of a family" means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child, grandchild. In deducing any such relationship, any illegitimate or adopted person is to be treated as the legitimate child of his mother and reputed father or adopters.

An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is enforceable, but only one action shall be brought in the United Kingdom in respect of the death of any one passenger, and every such action shall be for the benefit of all such persons entitled thereto as are domiciled in the United Kingdom, or, not being domiciled there, express a desire to take the benefit of the action.

The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to be just and equitable in view of the provisions of the First Schedule to the Act limiting the liability of a carrier (*h*) and of any proceedings which have been or are likely to be commenced outside the United Kingdom. Subject to these provisions the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court (or where the case is tried with a jury, the jury) shall direct.

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Navy Pay and Pensions Order, 1920, the Minister of Pensions has power to reduce the pension by the amount of damages awarded in the action, and the probability of his doing this must also be taken into account (*id.*).

(*h*) The liability for each passenger is limited to 125,000 francs. See also the Civil Aviation Act, 1949, s. 12.

2. **Injunctions.**—The remedy of an injunction was formerly granted only by Courts of Equity; it may now be granted by any Division of the High Court, though the equitable principles which formerly governed its grant will still be followed. The chief of these principles is that, being a discretionary remedy, it will not be granted where damages are a sufficient remedy (i).

If an infringement of a legal right has been established the plaintiff, in the absence of any special circumstances, is entitled to an injunction to prevent its repetition, provided that damages cannot sufficiently indemnify him (k), as, e.g., in the case of a continuing nuisance (l). An injunction may also be granted to restrain a threatened injury.

And, in all cases in which the Court may grant an injunction, it may award damages either in addition to or in substitution for such injunction. Accordingly, it may award damages for an injury that is merely threatened (m).

But an injunction will not be granted in the case of a trivial or occasional nuisance (n), or a trivial trespass where no material damage is caused and there is no danger that the defendant may by prescription acquire any right against the plaintiff (o). It has been laid down as a general rule that an injunction will not be granted “(i) if the injury to the plaintiff’s rights is small; (ii) and is one which is capable of being estimated in money; (iii) and is one which can be adequately compensated by a small money payment; (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction” (p).

### SECTION 3.—*Liability for Torts of Others*

A defendant may be liable not only for torts committed by him personally but also for those committed by his servant or agent or by a person to whom he has delegated a particular authority. But, subject to exceptions, he is not liable for torts committed by an independent contractor employed by him or by a person who is employed under a contract *for services* as distinct from a contract *of service*. Although, however, he is not directly

(i) *London and Blackwall Ry. v. Cross*, 31 Ch. D., at p. 369; 55 L. J. Ch. 813.

(k) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch., at pp. 810, 822; 61 L. J. Ch. 216.

(l) *Goodson v. Richardson*, L. R. 9 Ch. 221; 48 L. J. Ch. 790.

(m) *Leeds, etc., Society v. Slack*, [1924] A. C. 851; 93 L. J. Ch. 486.

(n) *Shelfer v. City of London Electric Lighting Co.* (*ubi supra*).

(o) *Behrens v. Richards*, [1905] 2 Ch. 614; 74 L. J. Ch. 615.

(p) *Shelfer v. City of London Electric Lighting Co.* (*ubi supra*), approved in *Colls v. Home and Colonial Stores*, [1904] A. C., at p. 212; 78 L. J. Ch. 484.

liable for the torts of a person employed by him, he may be indirectly liable on the ground that he was guilty of negligence in employing an improper or unqualified person.

There was formerly another class of cases, for, at Common Law, a husband was liable jointly with his wife for her torts, though by the Married Women's Property Act, 1882, his liability in respect of her ante-nuptial torts was only to the extent of any property acquired through her. But by s. 8 of the *Law Reform (Married Women and Tortfeasors) Act, 1935*, it is provided that the husband of a married woman shall not, *by reason only of being her husband*, be liable in respect of any tort committed by her, whether before or after the marriage, or be liable to be sued or made a party to any legal proceeding brought in respect of such tort.

The chief classes of cases that will now be considered are those in which a defendant is liable for the acts of his servant or agent and those in which he is liable for the acts of an independent contractor.

**Liability for the torts of servants and agents.**—A master or principal is liable for the torts of his servant or agent—

1. When they are the consequences of his own specific orders.
2. When they are committed “in the course of his employment”, or “within the scope of his authority” (q).
3. When they are ratified by him.

1. A master or principal is liable for all torts which he expressly orders his servant or agent to commit and for all torts which are the direct physical consequences of acts ordered by him.

Thus, in *Gregory v. Piper* (r), the defendant ordered his servant to lay down a quantity of loose rubbish near the plaintiff's stable-yard, but gave him instructions not to let any of it touch the plaintiff's wall. The rubbish was laid in a heap at a distance from the wall, but some of it ran down against the wall. *Held*, that the trespass was the act of the master. “The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if, in the execution of the order, it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass.”

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(q) These two expressions have exactly the same meaning: *Dyer v. Munday*, [1895] 1 Q. B., at p. 748; 64 L. J. Q. B. 448.

(r) 9 B. & C. 591. The only question actually in dispute in this matter was whether the proper form of action was trespass or case.



2. In the second class of cases, the liability of the master or principal depends upon the principle that "a person who puts another in his place to do a *class of acts* in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant but in the course of the employment" (s). Whether it was done in the course of the employment is a question of fact (t).

But, in order to render liable the master or principal, it is not necessary that the act done by the servant or agent should be one of a class which he is *expressly* authorised to do. Thus, in case of emergency any servant has *implied* authority to take reasonable steps to protect his master's property.

So, in *Poland v. Parr & Sons* (u), when a carter in the employment of the defendants was walking home to his dinner and thought he saw a boy stealing sugar from a waggon that was being driven by one of his employers along the street in which he was walking, and in consequence struck the boy and caused him to fall under the wheels of the waggon, it was held that the employers were liable although the carter was not at the time employed to do any work connected with the waggon.

As a general rule, therefore, a servant has implied authority to give a person into custody when it is necessary to do so in order to protect his master's property, but he has no implied authority to do so merely for the purpose of punishing the offender.

Thus, in *Abrahams v. Deakin* (x), the plaintiff went into the defendant's public-house and paid a foreign coin in mistake for a half-sovereign. The barman followed him into the street, and gave him into custody on a charge of attempting to pass bad money. It was held that the barman had no implied authority to arrest the plaintiff, his master's property no longer being in danger and the arrest being for the purpose only of punishing the plaintiff.

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(s) *Bayley v. Manchester, etc., Railway*, 11 L. R. 7 C. P., at p. 420; 41 L. J. C. P. 278; *Percy v. Glasgow Corporation*, [1922] 2 A. C., at p. 307; 91 L. J. P. C. 187.

(t) *Hutchins v. London County Council*, 114 L. T. 377; 85 L. J. K. B. 1177; 32 T. L. R. 179; *Jos ph Rand, Ltd. v. Craig*, [1919] 1 Ch. 1; 88 L. J. Ch. 45.

(u) [1927] 1 K. B. 236; 96 L. J. K. B. 152.

(x) [1891] 1 Q. B. 516; 60 L. J. Q. B. 238.

But a servant or agent can have no implied authority to do what his master or principal has no power to do (z). Thus it was held that the servant of a railway company could have no implied authority to arrest a passenger for an offence in respect of which the company itself had no legal power to arrest him (a).

*Delegation of duty by servant or agent.*—A servant or agent has in general no implied authority to delegate to any other person the performance of his duties unless some circumstances exist which give him authority to do so as an agent of necessity on behalf of his master (b). But though the master is not liable for the acts of the person to whom the servant has improperly delegated his duties, he may be liable for damage caused by the negligence of his servant in allowing another person to perform his duties.

Thus, in *Ricketts v. Thomas Tilling, Ltd.*, the driver of an omnibus negligently allowed the conductor to drive, and sat by him while he was driving. Through the careless driving of the conductor the plaintiff was injured. It was held that the defendants were liable, the cause of the injuries to the plaintiff being the negligent discharge of his duty by the driver (c).

And a master can delegate his authority; if, therefore, a master directs his servants to take orders from his manager, the orders of his manager become his orders, and acts done by his servants in accordance with those orders are done within the course of their employment in carrying out their master's directions, even though the orders are such as the manager had no authority to give (d).

Where an act done by a servant or agent is one of a class of acts which he was authorised or employed to do, the master or principal is liable (i) for the negligence or breach of duty of the servant or agent in the course of his employment; (ii) for excess or mistake by the servant or agent in the execution of his duty;

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(z) See *Percy v. Glasgow Corporation*, [1922] 2 A. C., at p. 312; 91 L. J. K. B. 187.

(a) *Poulton v. London and South Western Ry.*, L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; *Ormiston v. Great Western Ry.*, [1917] 1 K. B. 598; 86 L. J. K. B. 759.

(b) *William v. Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474.

(c) [1915] 1 K. B. 644; 84 L. J. K. B. 842, distinguishing *Beard v. London General Omnibus Co.* (post, p. 299), on the ground that in the earlier case the driving of the omnibus by the conductor was not due to any negligent delegation of his duties by the driver.

(d) *Irwin v. Waterloo Taxicab Co., Ltd.*, [1912] 3 K. B. 588; 81 L. J. K. B. 998.

and (iii) for a wilful wrong committed by the servant or agent in the course of his employment.

(i) *Negligence of servant*.—The following cases illustrate the liability of a master or principal for the negligence of his servant or agent.

In *Whatman v. Pearson* (e), a carter employed by the defendant was given an hour for dinner, but was not permitted to go home to dine or to leave his horse and cart. In disobedience to his orders he went home, and left his horse unattended in the street before his door. The horse having run away and injured the plaintiff's property, it was held that it was properly left to the jury to say whether the carter was acting "within the general scope of his authority to conduct the horse and cart during the day".

In *Abraham v. Bullock* (f), the defendant was a job-master, from whom a carriage with a horse and driver was hired for the conveyance of the plaintiff's traveller with samples of jewellery to be shown to customers. The driver negligently left the carriage unattended while the traveller was at lunch, and so gave an opportunity to thieves to steal its contents. It was held that the negligence of the driver was committed within the course of his employment, and was therefore negligence for which the defendant was responsible.

In *Jefferson v. Derbyshire Farmers, Ltd.* (g), the defendants, a firm of motor engineers, employed in a garage a youth who, while drawing motor spirit from a drum into a tin, lit a match and threw it on the ground, as a result of which the spirit caught fire and the garage was burnt down. It was held that they were liable for the negligent act of their servant in the course of his employment.

In *Aitchison v. Page Motors, Ltd.* (h), the plaintiff sent her car to the defendants for repairs and they sent it to the manufacturers. When it was repaired the defendants' manager went to fetch it, but instead of returning it at once, used it during the day for his own purposes and damaged it. *Held*, that as the defendants, who were bailees of the car, had delegated to their manager the duty of looking after it, they were liable for his breach of duty.

(ii) *Excess, mistake, or disobedience in execution of duty*.—If a servant or agent "happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are responsible for it" (i).

Thus, in *Builey v. Manchester, etc., Ry.* (k), where a railway porter, having authority to remove a person from a wrong carriage, misused that authority by violently pulling the plaintiff out of the

(e) 1 L. R. 3 C. P. 122; 37 L. J. C. P. 156. Compare *Engelhardt v. Farrant & Co.*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122.

(f) 86 L. T. 796; 18 T. L. R. 701, as explained in *Cheshire v. Bailey* (post, p. 299).

(g) [1921] 2 K. B. 281; 90 L. J. K. B. 1361.

(h) 52 T. L. R. 137.

(i) *Poulton v. London and South Western Ry.*, L. R. 2 Q. B., at p. 538; 36 L. J. Q. B. 291.

(k) L. R. 7 C. P. 415; 41 L. J. C. P. 48.

right carriage, it was held that the railway company was liable, since the porter was acting within the scope of his employment, "however much he may have abused his authority, however improperly and blunderingly he may have acted".

Excess may, however, be so great as to take the act out of the class of acts which the servant or agent is authorised or employed to do. Whether it is so or not is a question of degree (l).

The same principle applies to disobedience. "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employments" (m). The master is not responsible for a breach of the first class, but he is responsible for a breach of the second class.

Thus, in *Canadian Pacific Ry. v. Lockhart* (n), a servant of the appellant was entitled to use a motor car as a means of transport to his work. But he was forbidden to use an uninsured car. In disobedience to this prohibition he used an uninsured car and by negligent driving injured the respondent. Held, that the prohibition "merely limited the way in which, or by means of which, the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties". But "if the prohibition had absolutely forbidden the servant to drive his motor car in the course of his employment it might well have been maintained that . . . the driving of a motor car was outside the scope of his employment".

But the principal is not liable for any gratuitous assault or for any acts of mere caprice on the part of the agent (o).

Thus, in *Hutchins v. London County Council* (p), a passenger on a tramcar had a trivial altercation with the conductor, who thereupon, while he was taking from his pocket the money to pay his fare, threw him into the road. Under the by-laws the conductor had power to eject a passenger for certain offences, e.g., disorderly conduct or refusal to pay the fare. It was held that it was for the jury to determine whether the conductor was acting from mere caprice, or within the scope of his authority believing that an offence had been committed.

(iii) *Wilful wrong in the course of employment*.—A master or principal is liable for a wilful wrong committed by his servant or agent in the course of his employment, although it consists in

(l) *Poland v. Parr & Sons*, [1927] 1 K. B. 236; 96 L. J. K. B. 152.

(m) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A. C., at p. 67; 88 L. J. K. B. 197.

(n) [1942] A. C. 591.

(o) *Hutchins v. London County Council* (ubi supra). *Percy v. Glasgow Corporation* (ubi supra).

(p) *Ubi supra*.

conduct that has been expressly forbidden, although it amounts to a criminal offence and although it is committed solely for the benefit of the servant or agent. Thus

In *Limpus v. London General Omnibus Co.* (q), the driver of the defendants' omnibus, in order to prevent the plaintiff's omnibus from passing him, drove across it, and so caused it damage; the defendants were held liable, although they had given express instructions to their drivers not to race with or obstruct any other omnibus.

In *Dyer v. Munday* (r), the defendant, who sold furniture on the hire-purchase system, was held liable for an assault committed by his manager in the course of removing from the plaintiff's house some furniture on which some instalments of payment were in arrear (s).

In *Lloyd v. Grace, Smith & Co.* (t), the plaintiff consulted a firm of solicitors with a view to selling some property. She saw the defendants' conveyancing manager who conducted the conveyancing work of the firm without supervision. Fraudulently and for his own purposes he induced her to execute a conveyance to him of the cottages which he then disposed of for his own benefit. It was held that his employers were liable because the tort was "committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal".

But a master is not liable "for the acts of persons who are not his servants in respect of particular acts—that is, who are not acting within the scope of their employment in doing these acts". . . . "If the servant, in doing any act, breaks the connection of service between himself and his master, the act done under those circumstances is not the act of the master" (u).

Thus, in *Sanderson v. Collins* (x), the defendant was the bailee of a carriage, which without his knowledge was taken out by his coachman on a frolic of his own and injured in a collision. It was held that as the coachman was not acting in the course of his employment, the defendant was not liable.

But "if his servant whose duty it was to keep the carriage safely

(q) 1 H. & C. 526; 32 L. J. Ex. 31.

(r) [1903] 1 Q. B. 742; 64 L. J. Q. B. 448. See also *Goh Choon Seng v. Lee Kim Soo*, [1935] A. C. 550; 94 L. J. P. C. 129, where a master was held liable for an unauthorised trespass committed by his servants in the course of doing work which they were employed to do.

(s) Compare *Hutchins v. London County Council* (supra). See also *Groft v. Alison*, 4 B. & Ald. 590; 23 R. L. 507; *Joseph Rand, Ltd. v. Craig*, [1919] 1 Ch. 1; 88 L. J. Ch. 15.

(t) [1912] A. C. 716; 81 L. J. K. B. 1140.

(u) *Sanderson v. Collins*, [1904] 1 K. B. 628, at pp. 631, 632; 73 L. J. K. B. 375.

(x) *Ubi supra*. Other "independent frolic" cases are—*Mitchell v. Grasweller*, 13 C. B. 237; 32 L. J. C. P. 100; *Story v. Ashton*, L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Rayner v. Mitchell*, 2 C. P. D. 357.

had been negligent in leaving the coach-house open, and the carriage were taken away, the master would be liable" (y).

Similarly, in *Cheshire v. Bailey* (z), where the facts were the same as in *Abraham v. Bullock* (a), except that the defendant's servant, by arrangement with confederates, drove the vehicle to a place where its contents were stolen, it was held that the defendant was not liable, because the servant, by that criminal act, had severed the connection of service, and had ceased to be acting within the scope of his employment.

On the same principle, in *Beard v. London General Omnibus Co.* (b), where damage was caused through the negligent driving of an omnibus by the conductor, it was held that his employers were not liable in the absence of any evidence showing that he had special authority to drive.

In all the foregoing cases the liability of the defendant has been based upon an actual relationship of principal and agent or master and servant. But though no such relationship exists a person may be liable for the acts of another to whom he has made a "casual delegation" of a particular authority. Thus, where the owner of a car, without giving up the possession of it and the right to control it, allows another to drive it, he is liable for the negligence of the person permitted to drive.

So, in *Samson v. Aitchison* (c), the defendant was endeavouring to sell a car to A and in order to demonstrate the car took A and his son for a trial run. During the course of the run the defendant allowed A's son to drive and an accident occurred through his negligent driving. Held, that the defendant was liable since he had not given up the right to control the car.

Similarly, in *Pratt v. Patrick* (d), the defendant, while remaining in his car and retaining the right to control it, allowed it to be driven by a friend who was accompanying him. Held, that he was liable for damage caused by the negligence of his friend.

(y) *Id.* [1904] 1 K. B., at pp. 681, 682. Compare *Aitchison v. Page Motors, Ltd.* (*ante*, p. 296).

(z) [1905] 1 K. B. 237; 74 L. J. K. B. 176, followed in *Menta v. Silvertown*, 36 T. L. R. 899.

(a) *Ante*, p. 296.

(b) *Beard v. London General Omnibus Co.*, [1900] 2 Q. B. 530; 69 L. J. Q. B. 895. Compare *Ricketts v. Thomas Tilling, Ltd.* (*ante*, p. 295).

(c) [1912] A. C. 844; 82 L. J. P. C. 1.

(d) [1924] 1 K. B. 488; 93 L. J. K. B. 174. In the case of *Parker v. Miller* (42 T. L. R. 408) this principle was extended to a case in which the owner of a car had not remained in the car but had lent it to a friend in order that the latter might drive himself home. The ground of this decision apparently was that the owner had not given up his right to control. In *Samson v. Aitchison* (*ubi supra*) it was, however, said: "No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to the third person—the owner has given up his control": [1912] A. C., at p. 849. See also *Hewitt v. Bonvin*, [1940] 1 K. B. 188; 109 L. J. K. B. 223, where the owner of a car was held not to be liable for damage caused by the negligent driving of his son to whom he had lent the car.

On the same principle it was held in *Brooke v. Bool* (e) that the defendant, who was the owner of a lock-up shop, having invited a third person to assist him in looking for an escape of gas and being in control of the operations, was liable for damage caused by the negligence of his assistant in looking for the escape with a naked light.

3. *Ratification*.—A master or principal is also liable for acts of a servant or agent done without express or even implied authority if they are subsequently ratified by him (f). In order to create liability on this ground two conditions must be fulfilled, namely—

- (i) the act must be done by a person who purported to act for the person ratifying it (g);
- (ii) the ratification must be with full knowledge of the facts or with intent to assume, without inquiry, the risk of any irregularity that may have been committed (h).

**Liability for acts of an independent contractor and his servants.**—The liability of one person for the acts of another as his servant or agent depends upon his being the *employer* of that other person, *i.e.*, upon his having “a right, at the moment, to control the doing of the act” (i). “In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself or to the first person in the ascending line who is the employer and has control of the work. You cannot go farther back and make the employer of that person liable” (k).

If, therefore, a person employs a contractor, carrying on an independent business, to carry out lawful work for him, the end only being prescribed and the means of carrying it out being left to the contractor, he is not responsible for the casual acts of the contractor's servants in the course of their employment by the contractor (l).

Thus, in *Reedie v. London and North Western Ry.*, the defendants employed a contractor to build a bridge. During the building operations the contractor's workmen caused the death of a person passing under the bridge, by negligently allowing a stone to fall

(e) [1928] 2 K. B. 578; 97 L. J. K. B. 511.

(f) *Hulbery v. Hatton*, 2 H. & C. 522, 33 L. J. Ex. 190.

(g) *Wilson v. Tummam*, 6 Man. & G. 236; 12 L. J. C. P. 306.

(h) *Freeman v. Rasher*, 13 Q. B. 780; 18 L. J. Q. B. 340; *Lewis v. Read*, 13 M. & W. 231; 11 L. J. Ex. 295.

(i) *Donovan v. Lamy, etc., Syndicate*, [1898] 1 Q. B., at p. 634; 68 L. J. Q. B. 25.

(k) *Murray v. Currie*, L. R. 6 C. P., at p. 27; 40 L. J. C. P. 26.

(l) *Donovan v. Lamy, etc., Syndicate* (*ubi supra*); *Pickard v. Smith*, 10 C. B. (N.S.), at p. 180.

upon him. It was held that the defendants were not liable, although by the contract they had the power of dismissing incompetent workmen (m).

So also it was held by the Court of Appeal in *Gold v. Essex County Council* (n), that hospital authorities are not liable for the negligence of visiting surgeons and physicians who act under a contract for services, though they are liable for the negligence of members of the hospital staff acting under a contract of service, e.g., nurses, a radiographer, and a doctor who acts under such a contract.

But, even where a person employs an independent contractor, he may be liable in the following circumstances :—

1. Where he personally directs or assents to the doing of the particular act (o).
2. Where the work for which the contractor is employed is itself wrongful, as, e.g., an improper obstruction of a highway (p).
3. Where he is under a statutory obligation to perform work in a particular manner.

Thus, in *Hole v. Sittingbourne and Sheerness Ry.*, the defendants were authorised by their Act to construct a railway bridge across a navigable river. The Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than necessary to enable any traffic that was ready to cross, from crossing the bridge. The defendants employed an independent contractor who built a bridge which through defective construction could not be opened for several days, as a result of which the plaintiff's vessel was prevented from navigating the river. Held, that the defendants were responsible since it was their duty to see that the work authorised by their Act was done properly (q).

4. Where the work is of such a nature that its execution necessarily involves danger to other persons unless proper

(m) 4 Ex. 244; 20 L. J. Ex. 65. See also *Padbury v. Holliday & Greenwood, Ltd.*, 28 T. L. R. 494.

(n) [1942] 2 K. B. 293. In earlier cases (see e.g., *Hillyer v. St. Bartholomew's Hospital (Governors)* [1909] 2 K. B. 820; 78 L. J. K. B. 953) it had been held that, while a hospital authority was responsible for the negligence of its staff in ministerial matters, it was not liable for their conduct in matters of professional skill and care, because in such matters they are not servants of the hospital authority in the sense that their method of carrying out their work can be controlled by the hospital authority. In *Gold's* case, however, it is pointed out that the proper test is the nature of the contract between the hospital authority and the person guilty of negligence.

(o) *McLaughlin v. Pryor*, 4 Man. & G. 48; 11 L. J. C. P. 169; 61 R. R. 455; *Burgess v. Gray*, 1 C. B. 578; 14 L. J. C. P. 184; 68 R. R. 769.

(p) *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; 28 L. J. Q. B. 42.

(q) 6 H. & N. 488, and see *Gray v. Pullen*, 5 B. & S. 981; 34 L. J. Q. B. 285.



precautions are taken and the contractor fails to take those precautions.

So, in *Pickard v. Smith* (r), the servants of a coal merchant, while delivering coal into the defendant's cellar, left unguarded the open trapdoor of the cellar, through which the plaintiff fell. *Held*, that the defendant was liable because he was under a duty to take precautions to avoid mischief, and the fact that he entrusted this duty to the coal merchant's servants afforded him no defence.

Again, in *Tarry v. Ashton* (s), the defendant was the occupier and lessee of a house from which a large lamp was suspended over the pavement. This lamp, being out of repair, fell upon the plaintiff. It was held that the defendant ought to have kept the lamp in a safe condition so as not to become a nuisance, and that he was therefore liable, although shortly before the accident he had employed a contractor to repair it.

Again, in *Penny v. Wimbleton Urban Council* (t), the defendants, having employed a contractor to make up a highway, were held liable for damage caused by a heap of earth which, in the course of doing the work, the contractor's servants had left unfenced and unlighted upon the highway, such damage resulting not from "mere casual or collateral acts of negligence, such as . . . a workman negligently leaving a pickaxe, or such-like, on the road", but from failure to take precautions in the doing of the work which had to be done.

**Servants lent.**—Where a servant in the general employment of A is temporarily lent to B for the purpose of doing specific work, as, for example, for the purpose of working machinery or driving a vehicle let by A to B, the question as to whether the responsibility for his acts in doing that work is also transferred to B depends upon whether there was merely a transfer of services or a transfer of the servant so that entire and absolute control over such acts passed to the transferee.

So where the defendants had lent to a firm who were loading a ship a crane with a man in charge of it who in working the crane was under the orders of the firm, it was held that the man so lent was for that purpose the servant of the firm (u).

But in an ordinary case of hiring a vehicle and driver, the driver does not become the servant of the hirer merely because the latter may have the right to indicate the destination to which

(r) 10 C. B. (N.S.) 470.

(s) 1 Q. B. D. 314; 15 L. J. Q. B. 280.

(t) [1890] 2 Q. B. 72; 65 L. J. Q. B. 704. See also *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016.

(u) *Donnan v. Lamg, etc., Syndicate*, [1893] 1 Q. B. 621. See also *A. H. Bate & Co. v. West African, etc., Co.*, [1927] A. C., at p. 691; 96 L. J. C. P. 127. The burden is on the general employer to show that there has been a transfer of the servant, *Mersey Docks, etc., Board v. Coggins & Griffith*, [1917] A. C. 1.

wishes to be driven (x); no fixed line can however be drawn which, as a matter of law, the general employer of a driver is to be responsible and the temporary hirer becomes so; each must depend on its own circumstances (y).

Thus, in *Quarman v. Burnett* (a), two ladies, who owned a carriage, had for three years been in the habit of hiring a horse and driver from a job-mistress. They were always driven by the same man, to whom they paid a gratuity for each drive. An accident having been caused by his negligence, it was held that there was no evidence that he was acting as their servant. What was transferred to the ladies was merely the benefit of his services (b).

Again, in *Jones v. Liverpool Corporation* (c), the defendants, having their own water-cart, hired for it a horse and driver from X; the driver was paid by X and was not under the defendants' control except so far as their inspector gave him directions as to which streets to water. Injuries having been caused to the plaintiff by the negligence of the driver, it was held that the amount of control exercised over him by the defendants was not sufficient to make him their servant.

On the other hand, in *Jones v. Scullard* (d), the defendant was the owner of a brougham, horse and harness, which he kept with a livery stable keeper, from whom he hired a driver. Through the negligence of the driver the horse dashed through the windows of the plaintiff's shop. The particular driver had continuously driven the defendant for about six weeks before the accident. The horse was one which had been recently purchased by the defendant, and with which consequently the driver had but an imperfect acquaintance. It was held that there was evidence on which a jury might find that at the time of the accident the driver was acting as the defendant's servant.

In the latter case the materiality of the ownership of the horse lay in the fact that, as the hirer of the driver was the owner of the horse, he was entitled to control the manner of driving, whereas in the two former cases the hirers had no control over the driver except that they could indicate the direction in which he was to drive. But, as was pointed out in both these cases, any hirer may be liable for damage caused by his own actual interference or specific orders.

Where a cab proprietor lets a horse and cab to a driver for the purpose of plying for hire at his own discretion and not subject to the proprietor's control, the relation between them at

(x) *Donovan v. Laing, etc., Syndicate*, [1898] 1 Q. B., at p. 864.

(y) See *Jones v. Scullard*, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895.

(a) 6 M. & W. 499; 9 L. J. Ex. 808.

(b) See *Century, etc., Insurance Co. v. Imperial Smelting Corporation*, 42 J. A. C., at p. 516.

(c) 14 Q. B. D. 890; 54 L. J. Q. B. 345.

(d) *Ubi supra*.

Common Law is that of bailor and bailee, not of master and servant; but, with regard to cabs plying for hire within the City of London and the Metropolitan Police District, by the *London Hackney Carriage Act*, 1848, the proprietor is responsible to third persons for the acts of the driver, as if the relationship of master and servant existed between them (e).

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(e) See *Venables v Smith*, 2 Q. B. D. 279; 46 L. J. Q. B. 470; *King v London, etc., Cab Co.*, 23 Q. B. D. 281; 58 L. J. Q. B. 456; *Gates v. Bill*, [1902] 2 K. B. 38; 71 L. J. K. B. 702; *Smith v. General Motor Cab Co.*, [1911] A. C., at p 192; 80 L. J. K. B. 839. The Town Police Clauses Act, 1847, establishes a similar relationship in cases to which it applies. *Bygraves v Dicker*, [1923] 2 K. B. 585; 92 L. J. K. B. 1021.

## CHAPTER II

## TRESPASS, DETINUE, AND CONVERSION

SECTION 1.—*Trespass*

A TRESPASS is constituted by any immediate and direct physical interference with the person, land or goods of another (a).

Every trespass is of itself an invasion of an absolute right, and accordingly (i) it is actionable without proof of special damage; and (ii) the plaintiff in the first instance need only prove the trespass, the burden then shifting to the defendant to prove some circumstances of justification or excuse.

SUB-SECTION 1.—*Trespass to the person*

Trespass to the person may be by assault, battery, or false imprisonment.

**Assault and battery.**—An *assault* is an attempt, offer or threat to use any unlawful force to another; *battery* is the actual use of any unlawful force. Thus, if a man strikes at another with a stick or throws a stone at him, but does not hit him, it is an assault; if he hits him it is a battery; every battery, therefore, includes an assault.

An *assault* is constituted by any attempt to apply unlawful force to another, or by any threat which is accompanied by, or consists of, any act or gesture showing a present intent to use unlawful force, and which is also accompanied by “a present ability to carry the threat into execution” (b). Thus—

- 1 A being in B's workshop and refusing to leave, B and his workmen surrounded him, tucking up their sleeves and aprons, and threatened to break his head if he did not go out. It was held that this was an assault (c)
- 11 A advanced towards B in a threatening attitude and with the intent of striking B, but was stopped by another person just before he reached B. It was held that as A's blow would have reached B if he had not been stopped, he had committed an assault (c)

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(a) *Ante*, p 8, and see *Nichols v Ely Beet Sugar Factory*, [1981] 2 Ch., at p. 86; 100 L. J. Ch. 259.

(b) *Read v. Coker*, 18 C. B., at p. 860, 22 L. J. C P 201

(c) *Stephens v Myers*, 4 C & P. 349; 34 R R 819

So, also, it has been held to be an assault to ride after a person, obliging him to run away into a garden to avoid being beaten (*d*). And where the master of a board school detained a child after school hours for not doing home lessons which, under the Elementary Education Acts, 1870 and 1876, he had no power to set, it was held to be an assault (*e*).

But a mere threat "not in the slightest degree executed" does not constitute an assault, nor will even acts and gestures if done or made in such circumstances or at such a distance that the threat cannot possibly be carried into effect (*f*). Nor is there an assault if, in spite of the threat, the defendant uses words showing that he has no intention of carrying it into effect, as, e.g., where the defendant used threats of what he would do "were it not assize time" (*g*).

A *battery* includes every touching of another person in a rude, angry, or unlawful fashion, as by striking him, or throwing something which hits him (*h*), or driving a vehicle against him (*i*), or by the unlawful examination of a female prisoner against her will (*k*). Some hostile or unlawful intention must be proved, so that the mere touching of a person in order to call his attention is not a battery (*l*); nor is a person guilty of battery merely because he uses slight force when in a crowd, but if he "force his way in a rude, inordinate manner, it will be a battery" (*m*). And something more than mere passive obstruction must be shown, so that no tort is committed by a person who, without taking any active measures to prevent the plaintiff from entering a room, merely stands passively in the doorway (*n*).

When the act is in itself unlawful, an evil or malicious intent is a matter of aggravation. Thus where parish officers cut off the hair of a female pauper by force and against her consent, it was held that the jury, in awarding damages, might take into consideration the fact that it was done with the expressed intention of "taking down her pride" (*o*).

(*d*) *Martin v. Shoppee*, 3 C. & P. 373.

(*e*) *Hunter v. Johnson*, 13 Q. B. D. 225; 53 L. J. M. C. 182.

(*f*) *Cobbett v. Gray*, 1 Ex. 729; 19 L. J. Ex. 187.

(*g*) *Tuberville v. Savage*, 1 Mod. 3.

(*h*) *Scott v. Shepherd* (*ante*, p. 285).

(*i*) *Hall v. Pearbody*, 3 Q. B. 919; 12 L. J. Q. B. 22.

(*k*) *Agnor v. Johnson*, 13 Cox C. C. 625.

(*l*) *Tuberville v. Savage* (*ubi supra*); and see *Coward v. Baddeley*, 4 H. & N. 478; 25 L. J. Ex. 260; 118 R. R. 502.

(*m*) *Cole v. Turner*, 6 Mod. 119.

(*n*) *Innes v. Wylie*, 1 C. & K. 257; 70 R. R. 786.

(*o*) *Foide v. Skinner*, 4 C. & P. 289; 34 R. R. 791.

**Defences (p).—**In any action of tort the defendant may of course merely deny that he committed the acts alleged against him. He may also, in a proper case, rely on any of the general exceptions to liability and general defences that have been already set out. Accordingly, in dealing with specific torts reference will be made only to important illustrations of general defences and to the defences that are particularly applicable to that tort.

In an action of trespass to the person the defendant may prove—

1. His previous conviction or acquittal in summary proceedings (q).

2. That the act complained of does not amount to an assault or battery either because it was accidental (*i.e.*, involuntary) or that it was a lawful act done by consent (r).

But the mere fact that the trespass was unintentional is no defence where it was the result of a voluntary act.

Thus, in *James v. Campbell* (s), two persons were fighting and one of them unintentionally struck the plaintiff. *Uell*, that absence of intention was no defence, though it might be urged in mitigation of damages.

3. That it was excusable or justifiable.

Where a trespass to the person is the result of a lawful act it is a good *excuse* that it was neither intentional nor the result of negligence; but this excuse is no defence where the trespass is the immediate result of an unlawful action on the part of the defendant.

Thus, in *Stanley v. Powell* (t), the defendant while pheasant shooting injured the plaintiff as a result of a pellet from his gun glancing from the bough of an oak tree. The jury having found that the defendant was not guilty of any negligence, it was held that the defendant was not liable. "If the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is, as he must be, supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained (*i.e.*, unintentional), the verdict of the jury is equally fatal to the action" (u).

(p) See also the general exceptions to liability, *ante*, p. 267.

(q) *Ante*, p. 250.

(r) *Ante*, p. 271; and as to consent, see *Christopherson v. Burr*, 11 Q. B. 473; 17 L. J. Q. B. 109, and *Latter v. Braddell*, 50 L. J. Q. B. 418.

(s) 5 C. & P. 272.

(t) [1891] 1 Q. B. 86; 60 L. J. Q. B. 52.

(u) [1891] 1 Q. B., at p. 94.

(On the other hand, in *Sadler v. South Staffordshire, etc., Tramways Co.* (x), the defendants had statutory authority to run steam tramcars on a highway. Through a defect in the points a tramcar ran off the line and injured the plaintiff. The jury found that there was no negligence on the part of the defendants. *Held*, (i) that it was not a case of inevitable accident, (ii) that the absence of negligence was immaterial since the defendants were doing an unlawful act "in using the machinery, which they were authorised to use in a proper condition, while it was in a defective and improper condition".

Trespass to the person is *justified*—

- i. If committed in self-defence, or in defence of a wife, husband, parent or child, master or servant, provided that the force used is not more than is necessary for defence (y), and is actually used for defence and not in revenge after all danger is past (z).
- ii. If committed in defence of property. "If a person enters [or attempts to enter (u)] another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary) without a previous request to depart; but if the person enters quietly, the other cannot justify turning him out without a previous request to depart" (b). Again, if a person makes a disturbance in an inn or a private house, "the landlord . . . or occupier . . . is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out" (c).

So, also, churchwardens may "gently lay hands on those who disturb the performance of any part of divine service and turn them out of the church" (d).

Similarly, also, a trespass to the person may be justified if it was committed by the defendant in resisting a forcible

(x) 23 Q. B. D. 17; 58 L. J. Q. B. 421.

(y) *Cockroft v. Smith*, 11 Mod. 43; *Ryce v. Taylor*, 4 N. & M. 469; 4 L. J. K. B. 71. "Under the plea of 'son assault deemsne'" (i.e., a plea of justification on the ground of self-defence) "the defendant must show an assault by the plaintiff commensurate with the act complained of by the plaintiff" (4 N. & M., at p. 470).

(z) *R. v. Driscoll*, 1 C. & M. 214.

(u) *Polkinhorn v. Wright*, 8 Q. B. 107; 15 L. J. Q. B. 70.

(b) *Tullay v. Reid*, 1 C. & P., at p. 6; 28 R. R. 766.

(c) *Wheeler v. Whiting*, 9 C. & P., at p. 265; 62 R. R. 749.

(d) *Burton v. Henson*, 10 M. & W., at p. 108; 11 L. J. Ex. 348; 62 R. R. 531. See also *Noden v. Johnson* (*infra*), and *Bullen & Leake's Pleadings* (3rd ed.), p. 798.

attempt to dispossess him of his land (e), or goods (f), or in recovering goods of which he had been dispossessed (g).

In all the above cases, as in the case of self-defence, no more force must be used than is reasonably necessary.

iii. If committed to prevent a breach of the peace (h).

Thus, in *Noden v. Johnson* (i), the defendant, being captain of a vessel, justified on the ground that he used no more force than was necessary to prevent the plaintiff, who was a passenger on his vessel, from making a disturbance and fighting with the other passengers.

iv. If committed in the lawful exercise of authority (k).

**False imprisonment.**—"Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field . . . or in a man's own house, as well as in the common gaol; and . . . the party so restrained is said to be a prisoner so long as he hath not his liberty to go at all times to all places whither he will" (l).

The restraint must be *entire*—i.e., within a particular space; thus it is not an imprisonment merely to prevent a person from going in a particular direction.

Thus, in *Bird v. Jones* (m), a part of Hammersmith Bridge which is generally used as a public footway was appropriated for seats to view a regatta and separated from the carriage-way by a temporary fence. The plaintiff climbed over the fence, but the defendant then stationed two policemen to prevent him from passing along the footway, though he was told that he might go back into the carriage-way and proceed by it to the other side of the bridge. The plaintiff refused to do so, and remained where he was so obstructed for about half-an-hour. *Held*, that there was no imprisonment.

But there can be an imprisonment without in fact laying hands upon the person of the party imprisoned (n); "so, if a

(e) *Harvey v. Bridges*, 14 M. & W. 487; 14 I. J. Ex. 272.

(f) *Polkinhorn v. Wright* (*ubi supra*).

(g) See *Blades v. Higgs*, 10 C. P. (N.S.) 713; 80 L. J. C. P. 347.

(h) *Baynes v. Brewster*, 2 Q. B. 375; 11 L. J. M. C. 5; 57 R. R. 707.

(i) 16 Q. B. 218; 20 L. J. Q. B. 95.

(k) *Ante*, p. 274.

(l) Definition in *Termes de la Ley*, approved in *Meering v. Graham-White Aviation Co.*, 122 L. T., at pp. 51, 53. For other similar definitions, see *Bird v. Jones*, 7 Q. B. 743; 15 L. J. Q. B. 82.

(m) *Ubi supra*.

(n) *Warner v. Riddiford*, 4 C. B. (N.S.) 204; 114 R. R. 658 (approved 44 L. T., at p. 53, where it is cited as *Warner v. Burford*); see also *Grainger v. Hill*, 4 Bing. N. C. 212; 7 L. J. C. P. 85.



person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, *constructively*, an imprisonment"; and there may be a constructive imprisonment although the person imprisoned does not know or appreciate that he is subject to restraint, as, *e.g.*, where, without his knowledge, he is in fact under the restraint of police constables who have been stationed to control his movements and prevent him from leaving a particular place (o).

The imprisonment must be by the defendant himself or by his orders; if the defendant merely states the facts to a police officer, who, in the exercise of his duty, acts upon his own initiative in arresting the plaintiff, the arrest is that of the police officer (p). And, if the plaintiff has already been arrested by the police, the fact that the defendant, at their request, signs the charge-sheet does not make him responsible for the imprisonment (q). Where, however, the police refused to detain the plaintiff unless the defendant made a charge against him and signed the charge-sheet, it was held that the imprisonment was by the defendant (r).

If "the opinion and judgment of a *judicial* officer are interposed between the charge and the imprisonment" (s), there is no cause of action in trespass for false imprisonment, though an action of case may lie for malicious prosecution. Thus no action lies for false imprisonment "where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the party charged to be taken into custody, and detained until the matter can be investigated" (s). Nor, where a plaintiff has been taken into custody and brought before a magistrate, does an action of false imprisonment lie in respect of imprisonment under a remand, which is the act of the magistrate (t). But a magistrate or a Judge of a Court of limited jurisdiction may himself be liable to an action for false

(o) *Meering v. Grahame White Aviation Co.* (*ubi supra*). See, however, *Herring v. Boyle*, 1 C. M. & R. 577.

(p) *Seuill v. National Telephone Co.*, [1907] 1 K. B., at p. 559; 76 L. J. K. B. 196; *Meering v. Grahame-White, etc.* (*ubi supra*).

(q) *Seuill v. National Telephone Co.* (*ubi supra*); and see *Grinham v Willey*, 4 H. & N. 196; 28 L. J. Ex. 242.

(r) *Iustin v. Dowling*, L. R. 5 C. P. 584; 39 L. J. C. P. 260.

(s) *Id.*, L. R. 5 C. P., at p. 540.

(t) *Lock v. Ashton*, 12 Q. B. 871; 18 L. J. Q. B. 76.

imprisonment if he commits a person to prison on a matter on which he has no jurisdiction (u).

**Defences.**—The defendant may set up any matter which would justify an ordinary trespass to the person (x).

A curious instance of the maxim *Volenti non fit injuria* occurred in the case of *Herd v. Weardale, etc., Co.* (y). Here a miner descended a coal mine at 9.30 a.m.; under the terms of his employment he was entitled to be brought to the surface at the end of his shift, which expired at 4 p.m. After descending the mine the plaintiff refused to do the work which he was directed to do, and, at 11 a.m., he demanded to be raised to the surface. The lift was available at about 1 p.m., but the plaintiff was not allowed to use it until 1.30 p.m., and he brought an action against his employers claiming damages for false imprisonment in respect of this detention. *Held*, on the principle of *Volenti non fit injuria*, that the action could not be maintained. The plaintiff chose to go down the mine under a contract which gave him the right to return only at the end of his shift, and he had no right to demand special facilities for returning.

The defendant may also prove that the imprisonment was under a justifiable arrest (z)—i.e.—

1. That it was made under *Common Law* authority.

A private person may without any warrant arrest another—

- (i) to stay a breach of the peace continuing or likely to be renewed in his presence (a);
- (ii) to prevent the infliction of deadly injury or the commission of treason or felony (b);
- (iii) where a felony is committed in his presence (c), or where, though not committed in his presence, he can prove its commission and his reasonable suspicion that the person arrested is guilty of that particular felony (d);
- (iv) where persons do not disperse within one hour after proclamation made under the Riot Act (e).

A constable has all the powers of arrest of a private person, and, in addition, may without warrant arrest on a reasonable

(u) *Mason v. Barker*, 1 C. & K. 100; *Houlden v. Smith*, 14 Q. B. 841; 19 L. J. Q. B. 170; 80 R. R. 415.

(x) *Ante*, p. 307.

(y) [1915] A. C. 67; 84 L. J. K. B. 121.

(z) For arrest generally, see Archbold's Criminal Law, and Wiltshire and Harris' Criminal Law, Book IV, Chapter I.

(a) *Timothy v. Simpson*, 1 C. M. & R. 757; 4 L. J. M. C. 73; *Baynes v. Brewster*, 2 Q. B. 375; 11 L. J. M. C. 5; *Price v. Seeley*, 10 Cl. & F. 28; 59 R. R. 13.

(b) *Handcock v. Baker*, 2 B. & P. 260; 5 R. R. 597.

(c) *R. v. Price*, 8 C. & P. 282.

(d) *Walters v. W. H. Smith & Son*, [1911] 1 K. B. 595; 83 L. J. K. B. 335.

(e) *R. v. Fursey*, 6 C. & P., at p. 87; 40 R. R. 805.

charge (f) or reasonable suspicion of felony committed in this country (g), even though no felony has been in fact committed (h).

2. That it was made under *statutory authority*. By various statutes, which are outside the scope of this work, the power to arrest without warrant is given both to private persons and constables (i).

3. That it was made under a *lawfully executed warrant, writ or order, issued or made by a competent tribunal*.

By s. 6 of the *Constables Protection Act*, 1750, it is provided that no action shall be brought against any constable or other officer or any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace. If the constable acts in obedience to the warrant, then, though the warrant be an unlawful one, he is protected by the statute of 1750, but an action is maintainable against the magistrate issuing the warrant. But if the warrant is a lawful one and the constable executes it in an unlawful way, then no action is maintainable against the magistrate but an action is maintainable against the constable (k).

#### SUB-SECTION 2.—*Trespass to land*

Trespass to land, or, as it was formerly called, trespass *quare clausum fregit*, is constituted by "any entry upon or any *direct and immediate* act of interference with the *possession* of land" (l). Thus it is a trespass, not only if the defendant actually enters upon the plaintiff's land, but if he commits any act of encroachment, such as placing rubbish against the plaintiff's wall (m), or driving nails into it (n), or pouring filth and stinking water

(f) *Cowles v. Dunbar*, 2 C. & P. 565.

(g) *Berkwith v. Philby*, 6 D. & C. 635; 3 L. J. (o.s.) M. C. 132; 30 R. R. 184; *Diamond v. Winter*, [1911] 1 K. B. 556; 110 L. J. K. B. 593.

(h) *Id.*; and see *Walters v. W. H. Smith & Son* (*ubi supra*).

(i) See Archbold's Criminal Law, and Wilshire and Harris' Criminal Law (*ubi supra*). It may be mentioned that by s. 41 of the Larceny Act, 1916, any person to whom property is offered to be sold or pawned and who has reasonable cause to believe that any offence against the Act has been committed in respect of such property, may arrest and take before a magistrate the party offering the same, together with such property. In the case of pawnbrokers, this right is extended by s. 34 of the Pawnbrokers Act, 1872, which gives a pawnbroker the right to detain and give in charge a person who offers goods without being able to account satisfactorily for their possession.

(k) *Horshold v. Brown*, [1932] 1 K. B., at p. 369; 101 L. J. K. B. 177.

(l) Bullen and Leake's Pleadings (3rd ed.), at p. 415.

(m) *Gregory v. Piper*, 9 B. & C. 591; 33 R. R. 268.

(n) *Laurence v. Obee*, 3 Camp. 514.

upon the plaintiff's land (o), or building a house upon his own land with cellars under, and an upper storey projecting over, the land of the plaintiff (p).

And, if a person has a licence to do an act which would otherwise be a trespass, and continues it after the termination of the licence, he becomes a trespasser (q).

Thus, in *Konskier v. Goodman* (q), the defendants, who were contractors, were pulling down part of a house and obtained a licence from the owner of the adjoining house to pull down one of his chimneys upon condition of rebuilding it. This they did, but they failed to remove a lot of rubbish which they had allowed to fall on the roof of the adjoining house. This house was let to the plaintiff and during his occupation it became flooded through a gully being blocked by the rubbish. *Held*, that the defendants had merely a limited licence to put rubbish on the roof so far as it was a reasonable incident of their work and were bound to remove it when their work was done. By failing to remove it they became trespassers and the trespass was a continuing trespass which gave a right of action to a new occupier of the premises (r).

The property in land carries with it the ownership of everything *usque ad cælum et ad inferos*. Trespass, however, is an infringement of the possession of the plaintiff, and it is doubtful whether at Common Law there can be a trespass by mere entry into the air above land without interfering with its actual possession, as, e.g., by the firing of projectiles across it at a great height, or crossing it in a balloon. The consequences of an entry into the air above land might, however, be such as to found an action on the case for nuisance (s).

With regard to aircraft it is, however, provided by s. 9 of the *Air Navigation Act*, 1920, as amended by s. 28 of the *Air Navigation Act*, 1936, that no action shall lie in respect of trespass or nuisance by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, so

(o) *Preston v. Mercer*, Hardres 60, as explained in *Reynolds v. Clarke*, 2 Ld. Raym. 1399. But if the defendant merely allowed the filth and water to escape, the plaintiff's remedy would be by an action of case (*Tenant v. Goldwin*, 2 Ld. Raym. 1069).

(p) See *Lemmon v. Webb*, [1894] 3 Ch., at p. 18; *affirmed*, [1895] A. C. 1; 64 L. J. Ch. 205. But the encroachment by natural growth of the roots and boughs of A's trees over the land of B is not a trespass but may be a nuisance ([1894] 3 Ch., at p. 24). See also *Butler v. Standard Telephones & Cables, Ltd.*, [1940] 1 K. B. 399; 109 L. J. K. B. 238.

(q) [1928] 1 K. B. 421; 97 L. J. K. B. 263.

(r) See *post*, p. 317.

(s) See *Fay v. Prentice*, 1 C. B. 828; 14 L. J. C. P. 298.

long as the provisions of the Act and of any Order made thereunder are complied with. But where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in such aircraft, or by any article [or person (t)] falling from any such aircraft, to any person or property on land or water, damages are recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom it was suffered (u). Where, however, material damage or loss is caused as aforesaid in circumstances in which (a) damages are recoverable from the owner only by virtue of this section and (b) a legal liability is created in some person other than the owner, to pay damages in respect of such damage or loss, the owner shall be entitled to be indemnified by that other person against any claim in respect of such damage or loss (w).

The abuse of a right to enter upon land may amount to a trespass (x). Thus the improper use of a highway may be a trespass. "The soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium flum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs" (y). The legitimate use of a highway is, strictly speaking, merely for the purpose of passing and repassing; and although in modern times a reasonable extension has been given to the use of highways as such, so that the Court would not tolerate an action for a trivial trespass, yet no use is legitimate which is inconsistent with the paramount idea that the right of the public is merely one of passage (z).

Thus it is a trespass to permit cattle to depasture upon a highway (a) or to search for game thereon (b), or to make any use of

(t) These words were added by the Air Navigation Act, 1936, Fifth Schedule.

(u) The liability of various kinds of aircraft is, however, limited by the Second Schedule to the Act of 1936.

(v) Air Navigation Act, 1936, Fifth Schedule.

(w) See *Playfair v. Musgrove*, 11 M. & W. 239; 15 L. J. Ex. 26.

(y) *Harrison v. Duke of Rutland*, [1893] 1 Q. B., at p. 155; 62 L. J. K. B. 117.

(z) *Ibid.*, and see *Hickman v. Maisey*, *infra*.

(a) *Doraston v. Payne*, 2 H. Bl. 527; 3 R. R. 497.

(b) *R. v. Pratt*, 1 E. & B. 460; 21 L. J. M. C. 113; 99 R. R. 792.

it which is illegitimate as being "for too long a period and wholly disconnected with the purpose of passage", as, *e.g.*, by loitering upon it for an hour and a half to watch the training of horses upon the land of an adjoining owner (c).

In the case of *Harrison v. Duke of Rutland* (d), the defendant was the owner of moors which were intersected by a highway. While a grouse drive was in progress the plaintiff, for the purpose of interfering with it, walked up and down the highway and by various means, such as opening and shutting his umbrella, frightened away the grouse. He was asked to desist but refused to do so, and was in consequence caught and held down by the defendant's servants until the drive was over. He therefore brought an action for assault and false imprisonment in which the defendant justified on the ground that he was a trespasser and that no more force was used than was necessary to abate the trespass. *Held*, that the plaintiff was a trespasser and that the defendants were entitled to a verdict on the issue of justification.

Different strata of the soil may be the subject of distinct and separate rights, so that a landowner who has let the surface only may sue for trespass to the subsoil (e). And an action of trespass will lie not only for entry upon or interference with the land itself, but for interference with any corporeal property which is attached to the land, and to the *exclusive* possession of which the plaintiff is entitled, although he may have no other interest in the land, *e.g.*, a crop of growing corn or turnips (f). But it will not lie for interference with an incorporeal right unaccompanied by the exclusive possession of anything corporeal, *e.g.*, a right of common (g), an easement (h), or a mere licence (i).

**Trespassers ab initio.**—Where an authority is given to anyone by law and he abuses it by an act of *misfeasance*, he becomes a trespasser *ab initio*. The rule is stated and illustrated as follows in the old case of *Vaux v. Newman* (k): "When entry or licence is given to anyone by the law and he doth abuse it, he shall be a trespasser *ab initio*; but when an entry, authority or licence is given by the party, and he abuses it, then he must be

(c) *Hickman v. Muissey*, [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321.

(d) *Ubi supra*.

(e) *Cox v. Glue*, 5 C. B. 533; 17 L. J. C. P. 162.

(f) *Wellaway v. Courtier*, [1918] 1 K. B. 200; 87 L. J. K. B. 200. And this is so even though the plaintiff's right to dispose of the crop when severed is limited—as, *e.g.*, where he is bound to consume part on the land (*id.*).

(g) *Wilson v. Mackreth*, 3 Burr. 1824.

(h) *Mainwaring v. Giles*, 5 B. & Ald., at p. 361; 24 R. R. 417.

(i) *Hill v. Tupper*, 2 H. & C. 121; 32 L. J. Ex. 217; 138 R. R. 605, *post*, p. 820.

(k) *The Six Carpenters' Case* (1610), 8 Coke 146a

punished for his abuse, but shall not be a trespasser *ab initio*." Thus, "the law gives authority to enter into a common inn or tavern; so to the owner of the ground to distrain damage-feasant; . . . to the commoner to enter upon the land to see his cattle; and such like. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the owner, for damage-feasant, works or kills the distress, . . . or if the commoner cuts down a tree, in these and the like cases . . . he shall be a trespasser *ab initio*."

But a mere *non-feasance* cannot make a person a trespasser *ab initio*. So in the leading case it was held that the refusal by the defendants to pay for wine which they had drunk in a tavern did not render them trespassers *ab initio* so as to make their original entry into the tavern a trespass.

And, even in case of a misfeasance, the person committing it becomes a trespasser *ab initio* only in respect of that misfeasance.

Thus, in *Hurrey v. Pocock* (l), a landlord seized goods that were not distrainable together with others that were distrainable. *Held*, that he was a trespasser *ab initio* only in respect of the goods that were not distrainable.

So also, in *Elias v. Pasmore* (m), where police officers having lawfully entered premises unlawfully seized certain documents, it was held that they were trespassers *ab initio* only in respect of the documents.

**Who may maintain an action.**—Trespass is a disturbance of possession. As against a trespasser therefore any kind of possession is sufficient to support an action (n). But a trespasser cannot by the very act of trespass acquire such possession as will enable him to maintain an action for trespass against the *true owner* (o). For as against a mere trespasser who is in occupation of land, the true owner by entry acquires possession and may maintain an action of trespass against him if he wrongfully continues on the land (p).

An action of trespass must be carefully distinguished from an action for the recovery of land which is brought by a plaintiff who is out of possession against a defendant who is in possession. Here, since possession is a good title as against everyone but the true owner, the plaintiff must as a rule prove his *title*. But in

(l) 15 M. & W. 740; 13 L. J. Ex. 494.

(m) [1934] 2 K. B. 161; 103 L. J. K. B. 228.

(n) *Graham v. Peati*, 1 East 243; 6 R. R. 268; *Harper v. Charlesworth*, 4 L. & C., at pp. 591, 595; 3 L. J. (o.s.) K. B. 265; 28 R. R. 405.

(o) *Broune v. Dawson*, 12 Ad. & El. 624; 10 L. J. Q. B. 7.

(p) *Butcher v. Butcher*, 7 L. & C. 399; 6 L. J. (o.s.) K. B. 51; 31 R. R. 37; *Jones v. Chapman*, 2 Ex., at p. 621. See also *Lows v. Telford*, 1 A. C. 14; 45 L. J. Ex. 619.

this case also the rule applies that the defendant cannot by a mere trespass and ouster of the plaintiff give himself possession and invert the burden of proof. Accordingly, if the defendant is a mere trespasser on the plaintiff, it is sufficient for the plaintiff to establish that he was in possession at the time of the trespass (g). And, where an action for the recovery of land is brought by a landlord against his tenant, the tenant is estopped from denying the title of the landlord at the date when possession was given (r), though he may show that it has since determined (s).

The possession of the plaintiff may be actual or *constructive*; thus, where a servant is in occupation of land on behalf of his master, the servant has not possession but the master has constructive possession (t). But it must be an existing possession; thus, for example, the assignee of a lease cannot maintain an action of trespass before entry by him (u). It is, however, sufficient for the plaintiff to show that he had a right to possess at the time of the trespass and actual possession before action: his possession in such a case *relates back* to the time when the title arose, and for the purposes of the action he is deemed to have been in possession from that time (x). And where a person comes into possession of land on which there is a continuing trespass he has a cause of action for trespass in respect of it (y).

Where land is in the possession of a tenant an action of trespass can be brought only by him, not by the reversioner, who may, however, maintain an action of case for any *permanent* injury to his reversion (z).

Co-owners cannot maintain an action of trespass against each other unless there has been something amounting to an ouster of one by the other (a); as, for instance, if one expels the other (b)

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(g) *Davison v. Gent*, 1 H. & N. 744; 26 L. J. Ex. 122; *Asher v. Whitlock* L. R. 1 Q. B. 1; 35 L. J. Q. B. 17.

(r) *Doe v. Baytop*, 3 Ad. & El. 188; 4 L. J. K. B. 263.

(s) *Doe v. Edwards*, 5 B. & Ad. 1065; *Claridge v. Mackenzie*, 1 Man. & G. 143; 11 L. J. C. P. 72; 61 R. R. 504.

(t) *Bertie v. Beaumont*, 16 East 83.

(u) *Harrison v. Blackburn*, 17 C. B. (N.S.) 67; 34 L. J. C. P. 109.

(x) *Barnett v. Guildford (Earl)*, 11 Ex. 19; 24 L. J. Ex. 261; *Ocean Accident, etc., Corporation v. Ilford Gas Co.*, [1905] 2 K. B. 498; 74 L. J. K. B. 799.

(y) *Konskier v. Goodman*, [1928] 1 K. B. 421; 97 L. J. K. B. 268.

(z) *Baxter v. Taylor*, 4 B. & Ad. 72; 2 L. J. K. B. 65; 38 R. R. 227; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; 63 L. J. Ch. 399; *Jones v. Llanrust Urban Council*, [1911] 1 Ch., at p. 404; 80 L. J. Ch. 145.

(a) *Jacobs v. Seward*, L. R. 5 H. L., at p. 472; 41 L. J. C. P. 221; and see *Murray v. Hall*, 7 C. B. 441; 18 L. J. C. P. 161; 78 R. R. 708.

(b) *Murray v. Hall* (*ubi supra*).



or destroys the subject of the co-tenancy without the consent of the other (c). But a *temporary* destruction of property such as a party wall for the purpose of rebuilding it is not a trespass (d). And if a co-owner merely appropriates more than his proper share of property such as a mine the remedy is not an action of trespass but an action of account (e). It is no defence that the trespass was committed by mistake (f). Nor, except in the case of unfenced land adjoining a highway (g), is it necessary to show intent or negligence on the part of the defendant. Nor is the plaintiff bound to prove any special damage (h). An action for trespass must be brought within six years (i); but if the trespass continues after judgment a new action can be brought (k).

### Remedies other than by action.

1. *Right to re-enter and eject*.—Where the person on whose premises a trespass is threatened or committed is in possession he may, as has been seen, use reasonable force to prevent the trespass or eject the trespasser (l). And, as has also been seen, as soon as a person who is entitled to possession enters in the assertion of his right, the law immediately vests the actual possession in him. Accordingly, if an owner is out of possession he may re-enter and eject a trespasser if he uses no more force than is necessary. But, if he uses more force than is necessary, he is liable to an action for damages. And if he makes a “forcible entry” within the meaning of 5 Rich. 2, stat. 1, c. 7, he is liable to an indictment; this statute, however, gives no civil remedy to the trespasser, since the entry, though a breach of the statute, is not unlawful as against him (m).

(c) *Cresswell v. Hedges*, 1 H. & C. 421; 31 L. J. Ex. 497; and see Bullen & Leake (8rd ed.), p. 417.

(d) *Cubitt v. Porter*, 8 B. & C. 237; 6 L. J. (o.s.) K. B. 306; 32 R. R. 374.

(e) *Jacobs v. Seward* (*ubi supra*).

(f) *Bailey v. Jackson*, 3 Lev. 37.

(g) See *Tillett v. Ward* (*ante*, p. 255).

(h) *Williams v. Morland*, 2 B. & C. at p. 916; 2 L. J. (o.s.) K. B. 191; 26 R. R. 579.

(i) *Inte*, p. 275.

(k) *Bouyer v. Cook*, 4 C. B. 236.

(l) *Inte*, p. 318.

(m) *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720; 89 L. J. K. B. 711, overruling *Newton v. Morland*, 1 Man. & G. 644; 10 L. J. C. P. 11; 76 R. R. 188; *Boddall v. Matland*, 17 Ch. D. 174; 50 L. J. Ch. 401, and *Edwark v. Hawkes*, 15 Ch. D. 199; 50 L. J. Ch. 577, so far as it followed those cases. The statute provides “that none from henceforth make entry into any lands and tenements but in case where entry is given by law, and in such case not with strong hand nor with multitude of people, but only in lawful, peaceable, and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof be ransomed at the King’s will”.

2. *Distress damage-feasant*.—Where anything animate or inanimate is wrongfully on land, and is doing damage there of any kind, whether to the land or to animals thereon, it may be distrained *damage-feasant* by the possessor of the land and detained in order to compel its owner to make compensation for the damage (*n*). But the distress can be made only while the trespass is continuing (*o*), and nothing which is in actual use as, *e.g.*, a horse and cart which are actually being used by a trespasser (*p*). There is no power to sell anything so distrained, which is taken merely as a pledge or security for payment (*q*), and no action can be maintained for the damage while the distress is detained (*r*).

**Defences.**—The defendant may

- (i) deny that he committed the alleged acts of trespass;
- (ii) deny that they amounted to trespasses;
- (iii) deny the plaintiff's possession; or
- (iv) assert his own right of possession or title to the land.

But it is not sufficient for the defendant to prove that the plaintiff, being in possession, is not the true owner, unless he himself is, or he can justify his acts by the authority of a third person who is, the true owner (*s*). He cannot assert the bare title of a third person (*jus tertii*) except for the purpose of proving that he acted under the authority of that title (*t*).

The defendant may also justify on the ground that he entered by leave and licence of the plaintiff, or by virtue of some legal right, authority given by law, as, *e.g.*, in the exercise of a right of way, or to retake his goods which had been placed upon the land by the plaintiff (*u*), or to abate a nuisance (*x*), or to avert an imminent danger to his own property, as, *e.g.*, to extinguish a fire threatening his own property (*y*), or in execution of legal process (*z*), or by leave and licence of the plaintiff.

**Licences.**—It must be noted that a bare licence, *i.e.*, a licence

(*n*) *Boden v. Roscoe*, [1894] 1 Q. B. 608; 63 L. J. Q. B. 767.

(*o*) *Vasper v. Eddows*, 1 Ld. Raym. 719.

(*p*) *Fild v. Adames*, 12 Ad. & El. 649; 10 L. J. Q. B. 2.

(*q*) *Leharn v. Philpott*, L. R. 10 Ex. 242; 44 L. J. Ex. 22.

(*r*) In case of distress by a landlord for rent the power of sale was created by the Distress Act, 1689.

(*s*) *See Nichols v. Ely Beet Sugar Factory*, [1931] 2 Ch., at p. 86.

(*t*) *Bullen & Loake's Pleadings* (3rd ed.), p. 801; *Chambers v. Donaldson*, 11 East 65; 10 R. R. 435.

(*u*) *Patrick v. Colerick*, 3 M. & W. 483; 7 L. J. Ex. 135.

(*x*) *Post*, p. 886.

(*y*) *Cope v. Sharpe*, [1912] 1 K. B. 496; 81 L. J. K. B. 316.

(*z*) *See Bullen & Loake's Pleadings* (3rd ed.). p. 770.

not coupled with a valid grant of a proprietary right or given for value (a), "passes no interest but only makes an action lawful which without it had been unlawful" (b). Thus a bare licence to enter upon land of the licensor gives the licensee no interest in the land but merely prevents him from becoming a trespasser if he enters thereon in accordance with the terms of the licence.

But a licence may be coupled with a grant. Thus "a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day to his own use, are licences as to the acts of hunting and cutting down; but, as to carrying away the deer killed and the tree cut down, they are grants" (c).

A bare licence is personal and not assignable by the licensee (d). Nor does it bind an assignee of the licensor (e).

Even if it is an exclusive licence it gives the licensee no rights against third persons except in respect of any actual interference by them with his exercise of his own rights.

Thus, in *Hill v. Tupper*, A granted to B the "sole and exclusive right" to let out boats for hire on the Basingstoke Canal. Held, that B could not maintain an action against another person who also let out boats for hire upon the canal.

But he could have maintained an action if anyone had interfered with him in the exercise of his right (f).

A bare licence is *prima facie* revocable at any time even though given by deed or for valuable consideration, but if there is an express or implied contract not to revoke it for a certain period, an action for damages will lie for breach of the contract (g).

So in *Hurst v. Picture Theatres, Ltd.* (h), the plaintiff purchased a ticket for a seat at a cinema show. He was turned out of his seat under a mistake that he had not paid for it and brought an action for assault and false imprisonment. The defence was that the plaintiff had merely a revocable licence to

(a) See *Wood v. Manley*, 11 Ad. & El. 31; 9 L. J. Q. B. 27.

(b) *Thomas v. Sorrell*, Vaugh. 351; cited in *Muskett v. Hill*, 5 Bing. N. C. at p. 705. See also *Heap v. Hartley*, 42 Ch. D., at p. 468; 58 L. J. Ch. 790.

(c) *Thomas v. Sorrell* (*ubi supra*).

(d) *Muskett v. Hill* (*ubi supra*).

(e) *Coleman v. Foster*, 1 H. & N. 357. See also *Roffey v. Henderson*, 17 Q. B. 574; 21 L. J. Q. B. 49, where it was held that a licence given by a landlord to his tenant to remove fixtures after the expiration of the lease was not binding upon a new tenant in possession of the premises.

(f) *Nuttall v. Brucewell*, L. R. 2 Ex., at p. 12; 36 L. J. Ex. 1.

(g) *Guyot v. Thomson*, [1891] 3 Ch. 388; 61 L. J. Ch. 32; *Kerrison v. Smith*, [1897] 2 Q. B. 115; 66 L. J. Q. B. 762; *King v. David Allen & Sons, Ltd.*, [1916] 2 A. C. 51; 85 L. J. P. C. 229.

(h) [1915] 1 K. B. 1; 88 L. J. K. B. 1897.

remain in the theatre. It was held by a majority of the Court of Appeal, affirming the decision of Channell, J.: (i) that he had a licence coupled with a grant which, although not by deed, was, since the Judicature Act, 1873, enforceable in Equity; (ii) that there was an implied contract not to revoke the licence during the performance so long as the licensee was well-behaved.

In *Winter Garden Theatre v. Millennium Productions* (i), the appellants granted to the respondents a licence to use their theatre in return for a weekly payment. There was no express term for the termination of the licence and on September 11, 1945, the appellants served on the respondents a notice purporting to terminate the licence on October 15, 1945. It was held that the licence was terminable on reasonable notice and that the notice given was reasonable.

### SUB-SECTION 3.—*Trespass to goods. Replevin*

Trespass to goods is "an actual taking of, or any direct and immediate injury to" goods in the possession of the plaintiff (k). In the former case the wrong is constituted whether or not any actual damage has resulted therefrom either to the goods or to the plaintiff (l). In the latter case the slightest injury is sufficient; thus "scratching the panel of a carriage would be a trespass" (m).

"The plaintiff in an action of trespass must at the time of the trespass have the present possession of goods, either actual or constructive, or a legal right to the immediate possession, which is said in the case of personal property to draw to it the possession" (n).

But, as in the case of trespass to land, any kind of possession is good as against a wrongdoer (o).

Accordingly any bailee who is in possession of the goods bailed to him can maintain an action for a trespass to them while they are in his possession (p). If the bailment gives him the exclusive right to the possession of the goods he alone can sue in trespass though the owner of the goods may bring an action of case for any permanent injury to his reversionary interest (q).

(i) [1948] A. C. 173. Held also that *Wood v. Leadbitter*, 13 M. & W. 888, was decided on the pleadings and is no longer law.

(k) Bullen & Leake's Pleadings (8rd ed.), p. 414.

(l) *Leitch & Co. v. Laydon*, [1931] A. C., at p. 106; 100 L. J. P. C. 10.

(m) *Fouldes v. Willoughby*, 8 M. & W., at p. 549; 10 L. J. Ex. 864; 58 R. R. 808.

(n) Bullen & Leake's Pleadings (*ubi supra*). *Johnson v. Diprose*, [1893] 1 Q. B., at p. 515; 62 L. J. Q. B. 291.

(o) *Jefferies v. Great Western Ry.*, 25 L. J. Q. B. 107. As to the right of a bailee to sue, see further, *post*, p. 329.

(p) *The Winkfield*, [1902] P. 42; 71 L. J. P. 21.

(q) *Gordon v. Harper*, 7 T. R. 9; *Mears v. London & South Western Ry.*, 11 C. B. (N.S.) 850; 81 L. J. C. P. 220.

And, where the bailee has the exclusive right to the possession of the goods he may sue even the bailor for trespass (r). Where the bailment is determinable at will, either the bailor or the bailee may sue (s). A trustee can maintain an action for trespass on the ground of his immediate right to possession (t).

An act which is innocent when committed cannot subsequently become a trespass, but where an act is a trespass at the time of its commission an action may be maintained by a person who subsequently acquires a right to possession; thus an administrator can maintain an action for trespass against anyone who, between the death and the date of the grant, has committed a trespass to the goods of the deceased (u).

The doctrine of trespass *ab initio* applies to trespass to goods in the same way as it does to trespass to land (x). So also do the rules as to trespass by co-owners (y).

**Defences.**—The defendant may

- (i) deny the acts of trespass;
- (ii) deny the plaintiff's possession;
- (iii) set up his own right to possession.

But as in the case of trespass to land he cannot set up *jus tertii* unless he acted under it (a).

The defendant may also justify on the grounds that what he did was done in the execution of legal process or in the exercise of a licence or of a legal right, as, for instance, in self-defence or for the protection of property (b). But in the latter case a "reasonable necessity for such interference must be shown" (c). Thus an animal that is trespassing and doing damage to property may be killed only if no less violent measures will suffice to protect the property (d).

**Replevin.**—In an action of trespass, even where the plaintiff had actually been dispossessed of goods, he could recover only damages and not the goods themselves. But by the process of

(r) *Heydon v. Smith*, 13 Co. Rep. 67, and see Bullen & Leake's Pleadings (ubi supra).

(s) *Nicolls v. Bastard*, 2 C. M. & R. 659; 5 L. J. Ex. 7.

(t) Bullen & Leake's Pleadings (ubi supra).

(u) *Tharpe v. Stallwood*, 3 Man. & G. 760; 12 L. J. C. P. 241.

(x) See ante, p. 315.

(y) See ante, p. 317.

(a) *Carter v. Johnson*, 2 Mood & R. 263.

(b) See *Kirk v. Gregory*, 1 Ex. D. 55; 45 L. J. Ex. 186.

(c) *Id.*; 1 Ex. D., at p. 59.

(d) *Miles v. Hutchinsons*, [1903] 2 K. B. 714; 72 L. J. K. B. 775. See also *Vere v. Lord Caudor*, 11 East 368; 11 R. R. 269; *Taylor v. Newman*, 4 B. & S. 64; 32 L. J. M. C. 16.

replevin a person out of whose possession goods were unlawfully taken was enabled to obtain their return until the validity of his claim could be determined. The remedy of replevin is available in all cases of wrongful taking of goods and chattels (e), but its ordinary use is in cases of distress for rent or distress damage-feasant. The procedure is now governed by statute and consists of two parts, i.e., (i) the *replevy* by which re-delivery of the goods is obtained; and (ii) the *action of replevin*.

- i. The replevisor, that is to say the claimant, must give security, to be approved of by a County Court Registrar, for an amount sufficient to cover the alleged rent or damage, or, if goods have been seized otherwise than under colour of distress, the value of the goods, and in either case the probable costs of the action, conditioned to commence an action of replevin against the seizer within one week in the High Court, or one month in the county court, and to prosecute such action with effect (i.e., to a successful termination) and without delay and to make a return of the goods if a return thereof shall be adjudged. Where the action is to be brought in the High Court it must be a further condition of the security that the replevisor will, unless he obtains judgment by default, prove to the Court that he had good ground for believing either (a) that the title to some hereditament, the rent or value whereof exceeded £20 a year, or to some toll, market, fair or franchise was in question, or (b) that the alleged rent or damage in respect of which the distress was made, or the value of the goods seized, exceeded £20. The claimant must also give notice to the Registrar of the County Court of the district in which the cattle or goods have been seized, stating in what Court he intends to commence his action and what security he proposes. The Registrar gives notice to the seizer, who may attend and object to the security. If the security is approved and completed, the Registrar issues his warrant to the high bailiff, authorising and directing him to replevy and deliver the goods to the claimant (f).
- ii. The replevisor must then proceed with his action in the High Court or county court. If he succeeds he is entitled

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(e) *Mellor v. Leather*, 1 E. & B. 619; 22 L. J. M. C. 76; 93 R. R. 310; and see Bullen & Leake's Pleadings (3rd ed.), p. 392.

(f) County Courts Act, 1934, ss. 101—103.

to keep the goods and to recover the expenses to which he has been put in replevying them and any special damage which he has incurred through their seizure (g). If the defendant succeeds, he obtains judgment for the return of the goods, or, *in the alternative* (i) if the distress is for rent, for the value of the goods or amount of the rent, whichever is the less; and (ii) if the distress is for damage-feasant, for the amount of the damage (h).

**Retaking of goods.**—Originally a dispossessed owner of goods could not retake them except “on fresh pursuit” (i). But after the introduction of the action of replevin it was settled that he might retake them whenever he could find them, even by force, provided that no unnecessary violence was used (k), and, for the purpose of retaking them, might enter on the land of the wrong-doer (l). But his right ceases as soon as the goods have been sold in market overt to a person buying them in good faith and without notice of any defect or want of title on the part of the seller (m).

### SECTION 2.—*Detinue and Conversion*

The rights of a dispossessed owner of goods were further increased by means of the actions of detinue and conversion, in which, as in ejectment, the plaintiff relied, not upon his actual possession, but upon his immediate right to possess.

**Detinue.**—The action of detinue grew out of the action of debt and was originally an action to recover specific chattels owed by the defendant to the plaintiff just as debt was an action to recover a specific sum of money owed by the defendant. Later it was allowed to be brought, either upon an allegation of a delivery (*detinue sur bailment*) or of a finding (*detinue sur trover*), against anyone who unlawfully detained goods from the person entitled to their immediate possession, without regard to the means by which the defendant obtained possession of them, the allegations of delivery or finding not being traversable and

(g) *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273; *Smith v. Enright*, 63 L. J. Q. B. 220.

(h) County Court Rules, Order XXXIII

(i) See Williams *Personal Property*, Introductory Chapter, s. 2.

(k) *Blades v. Higgs*, 10 C. B. (N.S.) 713; 30 L. J. C. P. 347.

(l) *Patrick v. Colerick*, 3 M. & W. 183; 7 L. J. Ex. 135.

(m) Sale of Goods Act, 1893, s. 22. See *post* Book IV Chapter V.

being finally abolished by the *Common Law Procedure Act, 1852*. The gist of the action was accordingly merely the unlawful detainer. The necessary evidence of this was that the defendant had unjustifiably refused or failed to deliver the goods after demand by the plaintiff. And the defendant could not excuse himself by reason of having lost or parted with possession through his own wrongful act or neglect as, for instance, by selling or losing them (n).

The formal action of detinue has now been replaced by an action for the detention of goods (which is, however, governed by the same rules of substantive law as the action of detinue), in which the plaintiff claims the return of the goods themselves, or their value, and damages for their detention (o).

Before 1854 the defendant, under a judgment against him, had the option to deliver the goods or to retain them and pay the value at the date of the judgment (p). But by s. 78 of the *Common Law Procedure Act, 1854*, it was provided that, upon the application of the plaintiff, the Court may order execution to issue for the return of the chattel, without giving the defendant the option of retaining it upon paying its assessed value. And though this Act (with some exceptions) was repealed by the Statute Law Revision Act, 1888, the same provision is now contained in the Rules of Court (q). But the power vested in the Court to order the delivery up of a particular chattel is discretionary and ought not to be exercised where the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate (r).

(n) Williams' Personal Property (*ubi supra*); Bullen & Leake's, Pleading, (3rd ed.), pp. 311, 312; and see *Jones v. Dowle*, 9 M. & W. 19; *Reeve v. Palmer*, 5 C. B. (n.s.) 84; 27 L. J. C. P. 327; *Clayton v. Le Roy*, [1911] 2 K. B. 1081; 81 L. J. K. B. 49.

(o) See *Donald v. Suckling*, L. R. 1 Q. B., at p. 601; 35 L. J. Q. B. 232; 14 L. T. 772. For some time there was a controversy as to whether detinue was an action of contract or of tort, but it is now settled that it is an action of tort (*Bryant v. Herbert*, 3 C. P. D. 389; 47 L. J. C. P. 670). See also *ante*, p. 247.

(p) *Rosenthal v. Alderton & Sons, Ltd*, [1946] 1 K. B. 374. But see *Sachs v. Miklos*, [1948] 2 K. B. 23.

(q) Order XLIII, r. 6; Order XLVIII, r. 1; see also the County Court Rules, Order XXV, r. 74. An order for the issue of a writ of delivery can be made under these rules whether the value of the property has been assessed or not, which was doubtful under the language of the common Law Procedure Act (*Hymas v. Ogden*, [1905] 1 K. B. 246; 74 L. J. K. B. 101).

(r) *Whiteley v. Hilt*, [1918] 2 K. B. 806; 87 L. J. K. B. 1058; 34 T. L. R. 502.



Where the defendant satisfies a judgment for the value of the goods, the transaction operates as a sale of the goods to him by the plaintiff (s).

**Conversion.**—In the fifteenth century a person who had been dispossessed of his goods acquired a further remedy in the action of trover. This was an action of *case*, in which the plaintiff could recover the value of the goods on the ground that the defendant had wrongfully converted them to his own use. The name of trover is due to the original form of the action, which alleged that the plaintiff had lost the goods and that the defendant had found them and converted them to his own use. Later this action was extended to all conversions of goods, the allegation of the loss and finding not being traversable, and being finally abolished by the Common Law Procedure Act, 1852 (t). And, even where the original taking of the goods was a trespass, the plaintiff might waive the trespass and sue in case for the conversion (u).

The modern action of conversion lies for any dealing with goods in a manner inconsistent with the right of the true owner, even though the defendant has never been in physical possession of the goods, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right (v).

Thus it is conversion if goods are sold by a hirer (w), or delivered to the wrong person by a carrier (y) or warehouseman (z), or if a sheriff in levying execution sells the wrong person's goods (a), or if a person buys and takes possession of goods which have been improperly sold (b), or generally if a person "however innocently, obtains possession of the goods of a person who has

(s) *R. v. Drake*, 5 Ch. D., at p. 871; 46 L. J. Bk. 105.

(t) Williams' *Personal Property* (*ubi supra*). Bullen & Leake's *Pleadings* (3rd ed.), p. 290, and see *Burroughes v. Bayne*, 5 H. & N., at p. 801; 29 L. J. Ex. 188; *Oakley v. Lyster*, [1931] 1 K. B., at p. 153; 100 L. J. K. B. 177.

(u) *Cooper v. Chetty*, 1 Burr., at p. 31; *Holland v. Bird*, 10 Bing. 15; 2 L. J. C. P. 201.

(v) *Oakley v. Lyster* (*ubi supra*). See also *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. 178; 108 L. J. Ch. 5.

(i) *Cooper v. Wallomatt*, 1 C. B. 672; 14 L. J. C. P. 219.

(y) *Wyld v. Pickford*, 8 M. & W. 443; 10 L. J. Ex. 382.

(z) *Hart v. London and North Western Ry.*, 6 Ex. D. 188; 48 L. J. Ex. 545; 40 L. T. 674.

(a) *Glasspoole v. Young*, 9 B. & C. 696; 7 L. J. (o.s.) K. B. 305; 33 R. B. 294.

(b) *Hilbery v. Hatton*, 2 H. & C. 822; 30 L. J. Ex. 190; 10 L. T. 39.

been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person" (c).

So also there is a conversion where the purchaser of land claims to be the owner of property of the plaintiff which is lying upon the land and denies the plaintiff's right to remove it (d).

Thus, in *Oakley v. Lyster* (d), the plaintiff had stored some material belonging to him upon land which he rented from A. Before the expiration of his tenancy the freehold of the land was bought by the defendant whose solicitors wrote to the plaintiff stating that the material belonged to the defendant and forbidding the plaintiff to remove any of it. *Held*, that the defendant was liable for conversion because he had claimed "to exercise as against the plaintiff the rights of an owner in respect of the goods".

In the case of co-owners of chattels substantially the same principles apply as have been stated with regard to co-owners of land (e).

The refusal by a defendant to deliver up goods in his possession upon demand for their delivery is *prima facie* evidence but does not necessarily amount to a conversion. "If the refusal is in disregard of the plaintiff's title and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title of the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion" (f). Thus, where goods are demanded from a servant in whose custody they are, his refusal to deliver them until he has had an opportunity of obtaining instructions from his master is not a conversion (g). "An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one" (h).

Since a mere demand and refusal may amount to a conversion, the action of trover has to a considerable extent

(c) *Hollins v. Fowler*, L. R. 7 H. L., at p. 795; 44 L. J. Q. B. 169. But an involuntary bailee of goods who acts with reasonable care is not guilty of conversion merely because he delivers them to an apparently trustworthy person who falsely pretends to be a representative of the true owner; *Elvin & Powell, Ltd. v. Plummer Rodds, Ltd.*, 50 T. L. R. 158.

(d) *Oakley v. Lyster* (*ubi supra*).

(e) See *ante*, p. 317.

(f) *Hollins v. Fowler*, L. R. 7 H. L., at p. 766; and see *Burroughes v. Bayne* (*ubi supra*); *Cobbett v. Clutton*, 2 C. & P. 471; *Clayton v. Le Roy*, [1911] 2 K. B. 1081; 81 L. J. K. B. 49.

(g) *Alexander v. Southey*, 5 B. & Ald. 247; 24 R. R. 318.

(h) 5 B. & Ald. at p. 249.

overlapped the action of detinue. But because of its simplicity the action of detinue is still frequently used in practice. And in some cases it must be used, *e.g.*, if the return of the goods themselves is desired, or if there is a mere detention of the goods without any fact constituting a conversion. Thus, a bailee who negligently loses goods cannot be sued for conversion though he may be sued in detinue (i).

In order to constitute a conversion there must always be an intention of the defendant to take to himself the possession of the goods or to deprive the plaintiff of it. Accordingly, though the total destruction of the plaintiff's goods by the defendant is a conversion, a mere injury amounts only to a trespass (k). And, though the simple asportation of a chattel is a trespass, it does not amount to a conversion independently of any claim over the chattel, either in favour of the defendant himself or any third person.

Thus, in *Fouldes v. Willoughby* (l), the plaintiff embarked on the defendant's ferry boat with some horses; the defendant, in order to get rid of the plaintiff, who was alleged to have behaved improperly on the boat, refused to carry the horses and put them on shore; the plaintiff having brought an action for conversion it was held that the simple removal of the horses "for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the use and enjoyment of them" did not amount to a conversion.

An agent who commits a conversion is not excused merely because he acted in good faith under the instructions of his principal and in the ordinary course of his business.

Thus, in the case of *Consolidated Co. v. Curtis*, the owner of certain furniture assigned it by bill of sale to the plaintiffs but subsequently employed the defendants, who were auctioneers, to sell it by auction on her behalf at her residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the residence of the assignor, and, in the ordinary course of their business, delivered it to the purchasers. It was held that as the defendants "transferred as far as in them lay the dominion over and property in the goods to the purchasers", they were guilty of a conversion (m).

(i) See *Williams v. Gesse*, 3 Bing. N. C. 349.

(k) *Simmons v. Lillystone*, 8 Ex. 431; 22 L. J. Ex. 217.

(l) 8 M. & W. 510; 10 L. J. Ex. 364; 58 R. R. 503.

(m) [1892] 1 Q. B. 195; 61 L. J. Q. B. 325. Compare *Stephens v. Elwall*, 4 M. & S. 259; 16 R. R. 458; *Cochrane v. Rymill*, 40 L. T. 744 *Barker v. Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368.

But an auctioneer or broker who does not himself exercise any dominion over goods but merely settles the price is not guilty of a conversion (n). Nor is any intermediate agent, such as a packing agent, liable for conversion if he acts merely as a conduit-pipe for the purpose only of changing the position or custody of goods and not the property in them (o). In the case of *Hollins v. Fowler* (p), it was suggested as a general rule by Blackburn, J., that "one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods (q), or entrusted with their custody. . . . Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, although that person turns out to have no authority from the true owner".

Another illustration is given by Bramwell, L.J., in *National Mercantile Bank v. Rymill* (r). "Take the case of a man who steals a portmanteau and takes it to a cloakroom at a railway station and afterwards returns with the ticket, and asks to have the portmanteau back, or delivers the ticket to an accomplice, whom he sends to get the portmanteau. In such a case as that, suppose the servants of the railway company delivered the portmanteau to the thief or to the accomplice, can it be contended for a moment that an action for the conversion of the portmanteau would lie against the railway company?"

*Who may maintain an action for detinue or conversion.*—The plaintiff must either have the immediate right to possess or, in case of conversion, the goods must have been in his actual or constructive possession at the time of the conversion (s). A bailor can therefore sue in detinue or conversion when he has

(n) *Cochrane v. Rymill*, 40 L. T., at p. 746; *National Mercantile Bank v. Rymill*, 44 L. T. 767; *Barker v. Furlong*, [1891] 2 Ch., at p. 181.

(o) *Greenway v. Fisher*, 1 C. & P. 190; *Barker v. Furlong*, [1891] 2 Ch., at p. 182; 60 L. J. Ch. 368.

(p) L. R. 7 H. L., at pp. 766, 767.

(q) "The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And, therefore, it is no conversion if he *bona fide* removes them to a place of security." *Id.*, at p. 767.

(r) 44 L. T., at p. 767.

(s) See *Gordon v. Harper*, 7 T. R. 9; *Nyberg v. Handelaar*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709; 67 L. T. 361. But in case of conversion, the doctrine of relation back may apply so as to enable a plaintiff to maintain an action for a conversion before his title accrued. *Balme v. Hutton*, 9 Bing. 471.

an immediate right to the possession of the goods which are the subject of the bailment.

Thus, in *Jelks v. Hayward* (t), the owners of furniture let it under a hire-purchase agreement, which contained a clause giving them a right to retake possession without notice if it should be taken in execution. Held, that they were entitled to maintain an action for conversion against the high bailiff, who seized and sold the goods under an execution, they having become entitled to the possession of the furniture immediately upon its seizure.

A bailor who is not entitled to immediate possession of the property may nevertheless sue in case for any damage to his reversionary interest (u).

Since possession carries with it the right to possess as against everyone but the true owner, any bailee can maintain against a wrongdoer an action of detinue or conversion (w). So also a finder of goods can maintain detinue or conversion against anyone who cannot show a better title to the goods.

Thus, in the case of *Armory v. Delamirie* (y), it was held that a chimney-sweeper's boy who had found a jewel could maintain an action of trover against a jeweller to whom he had shown the jewel for the purpose of ascertaining its value and who had refused to return it.

But before the goods can be "found" they must have been lost by their previous possessor, and they are not lost so long as they are in his possession.

Thus, in the case of *South Staffordshire Water Co. v. Sharman*, the defendant was employed by the plaintiffs to clean out a pool of water on their land. Whilst so doing he found two rings and placed them in the hands of the police, who, failing to find the true owner, returned them to him. The plaintiffs then sued the defendant in detinue for the recovery of the rings, and it was held that they were entitled to recover, the general principle being that "where a person has possession of house or land, with a manifest intention to exercise control over it, and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*" (z).

(t) [1903] 2 K. B. 460; 74 L. J. K. B. 717.

(u) *Mears v. London and South Western Ry.*, 11 C. B. (N.S.) 850; 81 L. J. C. P. 226; 132 R. B. 778.

(x) See further, *post*, Part III, Chapter IV.

(y) 1 Str. 505.

(z) [1896] 2 Q. B. 41; 65 L. J. Q. B. 418. See also *Habbert v. McKiernan*, [1918] 2 K. B. 112; [1918] L. J. R. 1521, where A, a trespasser on golf links, took possession of golf balls lost by their owners, knowing that police were employed to prevent unauthorised persons from picking up and taking away lost balls. It was held that he was guilty of larceny.

On the other hand, in *Bridges v. Hawkesworth* (a), the plaintiff picked up a bundle of notes in a public shop, the shopkeeper not knowing they had been dropped and never exercising any control over them. The plaintiff gave the notes to the shopkeeper in order that he might advertise them, and, when the owner was not found, claimed to have them redelivered to him. It was held that he was entitled to do so, as they were never in the custody of the shopkeeper or "within the protection of his house".

And in *Hannah v. Peel* (b), the defendant owned a house which he had never occupied. The plaintiff, a soldier stationed in the house found in 1940 in a crevice on the top of a window frame a brooch which he handed to the police and, no owner of it having been found, it was handed back in 1942 to the defendant, who claimed it as owner of the house, and from whom it was claimed by the soldier. It was held that as the defendant never had any physical possession of the house or any knowledge of the brooch, it was "lost" in the ordinary meaning of the term and found by the plaintiff.

**Defences to an action of detinue or conversion.**—In an action of detinue or conversion the defendant may—

- (i) deny that he committed the acts alleged;
- (ii) deny that they amounted to detinue or conversion;
- (iii) set up any matter of justification, as, *e.g.*, that the goods were detained under a legal right, as, *e.g.*, because he had a lien over them (c) or because they were pledged to him for a debt which remained unpaid (d);
- (iv) deny the plaintiff's right of possession (e).

*Jus tertii.*—In an action of detinue or conversion, the general rule is that the plaintiff must prove his right to possession and that the defendant may therefore, in answer, set up the right of a third person (f). A bailee cannot, however, avail himself of the title of a third person as a defence to an action of detinue by the bailor except by showing that he is defending by authority of that person (g).

(a) 21 L. J. Q. B. 75; 91 R. R. 850. This presumption does not, however, apply to treasure trove, which "is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown. . . . *Prima facie* the title to treasure trove is in the the Crown; but . . . that title may be displaced by producing a grant to a subject of the franchise of treasure trove": *Att.-Gen. v. Moore*, [1898] 1 Ch., at p. 683; 62 L. J. Ch. 607.

(b) [1945] 1 K. B. 509; 114 L. J. K. B. 539.

(c) *Lane v. Tewson*, 12 Ad. & El. 116; 11 L. J. Q. B. 17.

(d) *Mason v. Farnell*, 12 M. & W. 674; 13 L. J. Ex. 142, and see Bullen & Leake's Pleadings (3rd ed.), pp. 716, 717, 728, 729.

(e) Bullen & Leake's Pleadings (*ubi supra*).

(f) *Leake v. Loveday*, 4 Man. & G. 972; 12 L. J. C. P. 65; 61 R. R. 707.

(g) *Rogers v. Lambert*, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187.

In an action of trespass, on the other hand, as has already been pointed out, any kind of possession is good as against a wrongdoer, who cannot therefore set up the title of a third person. And the same rule applies to a conversion which involves a trespass. Accordingly, a plaintiff who is in actual possession of goods at the time of a conversion, although himself a wrongdoer, can maintain an action for their conversion, and the defendant cannot set up the title of a third person (h).

The damages in an action for conversion may be nominal, if the conversion was merely trivial or technical (i), or they may be substantial.

In the latter case, in the absence of any special damage caused by the conversion, the measure of the damages is the value of the goods at the date of the conversion (k). This, in ordinary circumstances, is the market value, but it may be "a special value attached by special circumstances to the articles converted" (l).

Thus, in *France v. Gaudet* (m), the plaintiff purchased at 14s. a dozen some champagne lying at the defendant's wharf and re-sold it at 24s. to the captain of a ship which was about to leave England. The defendant refused to deliver the champagne and the plaintiff was unable to procure similar champagne in the open market. Held, that the measure of damages was 24s. a dozen.

And the plaintiff is always entitled to recover any special damage caused by the conversion, as, e.g., any loss of profit which he might have made by the use of the chattels converted (n).

Where the action is brought by a bailee, the nature of his possession and the extent of his liability to the bailor is immaterial as between him and a stranger, so that he may recover the full value of goods destroyed or converted. But "as between bailor and bailee, the real interests of each must be enquired into, and, as the bailee has to account for the thing

(h) *Jefferies v. Great Western Ry*, 5 E. & B. 802; 25 L. J. Q. B. 107; 103 R. R. 753; *Glenwood v. Phillips*, [1904] A. C., at p. 410; 78 L. J. P. C. 62.

(i) See *Kirk v. Gregory*, 1 Ex. D. 55; 45 L. J. Ex. 186; *Hvort v. London and North Western Ry*, 4 Ex. D. 188; 48 L. J. Ex. 545.

(k) *Balm v. Hutton*, 9 Bing., at p. 477; 2 L. J. Ex. 116; *Henderson v. Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 508; *Re Simms*, [1934] 1 Ch. 1; 103 L. J. Ch. 67.

(l) [1931] 1 Ch., at p. 23. See also *Carton Publishing Co. v. Sutherland Publishing Co*, [1939] A. C., at pp. 208-206; 108 L. J. Ch. 5.

(m) L. R. 6 Q. B. 199; 40 L. J. Q. B. 121.

(n) *Re Simms*, [1894] 1 Ch. 1; 103 L. J. Ch. 67; *Bodley v. Reynolds*, 8 Q. B. 779; 15 L. J. Q. B. 219.

bailed, so he must account for that which has now become its equivalent and now represents it: what he has received above his own interest he has received to the use of his bailor" (o).

Where the full value of the goods has been recovered, the satisfaction of the judgment vests the property in the goods in the defendant (p). But until the judgment is satisfied the plaintiff may still exercise all his rights as owner. "He may seize the property either from the defendant or from any one else in whose hands it may be. Further, he may sue another for its specific restitution or for damages and get a second judgment for the value of the property against that other in respect of any other conversion committed either before or after the conversion on which the first action was brought. Of course he cannot in any case by the exercise of his concurrent remedies obtain a double satisfaction. If he actually recovers the property, his judgment for its value becomes inoperative; and if he recovers its value he cannot exercise his right of recaption or enforce his judgment for specific restitution—in other words, if he recovers the property or its value from one defendant he cannot enforce his judgment against another" (q).

### SECTION 8.—*Wrongful Distress*

A distress may be wrongful because it is (1) illegal; (2) excessive; or (3) irregular.

1. *Illegal distress*.—A distress is illegal where there is no right to distrain, as, e.g., where there is no demise, or where no rent is in arrear, or where privileged goods are seized. The remedies are (r)—

i. Actions for trespass and conversion.

ii. Replevin.

iii. An action under the *Distress Act*, 1689, for the double value of any goods seized and sold when no rent was due.

2. *Excessive distress*.—If a landlord seizes more goods than are sufficient to satisfy arrears of rent and expenses, he is liable, under the *Statute of Marlebridge* (s), to an action for excessive

(o) *The Winkfield*, [1902] P., at pp. 60, 61; 71 L. J. P. 21.

(p) *Bunsmead v. Harrison*, L. R. 6 C. P. 584; 40 L. J. P. C. 281.

(q) *Ellis v. John Stenning & Son*, [1932] 2 Ch., at pp. 90, 91; 101 L. J. Ch 401. As to the alternative remedies which are open to a plaintiff where there has been a conversion of his goods by their wrongful sale, see *ante*, p. 80 (note (t)).

(r) There are also certain summary remedies.

(s) 52 Hen. 3, c. 4.



distress. But, in the absence of any special damage, no action lies for a distress under a *claim* of more than is due, provided that no more goods are seized than are sufficient to satisfy the amount due (t). If, upon an excessive distress, the goods are not sold, the plaintiff is entitled to recover nominal damages (u); if they are sold he is entitled to recover their fair value (v).

3. *Irregular distress*.—A distress is irregular where, though right to distrain exists, some wrongful act is committed after the seizure, as, *e.g.*, some irregularity in selling the goods. Formerly any such act rendered the landlord a trespasser *ab initio*, but, by s. 19 of the Distress for Rent Act, 1787, it was provided that “where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party . . . distraining . . . the distress itself shall not be therefore deemed to be unlawful, nor the party . . . making it be deemed a trespasser . . . *ab initio*; but the party . . . aggrieved . . . shall or may recover full satisfaction for the special damage he . . . shall have sustained thereby, and no more”.

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(t) *Tancred v. Leyland*, 16 Q. B. 669; 20 L. J. Q. B. 216; 83 B. R. 663.

(u) *Chandler v. Doulton*, 8 H. & C. 553; 34 L. J. Ex. 89; 140 B. R. 602.

(v) *Wells v. Moody*, 7 C. & P. 59; 48 B. R. 759.

## CHAPTER III

## NUISANCES—INTERFERENCE WITH EASEMENTS AND NATURAL RIGHTS

## SECTION 1.—Nuisance

NUISANCES may be either public or private. The remedy for a public nuisance is either criminal proceedings by way of indictment or civil proceedings by way of information, *i.e.*, an action by the Attorney-General in his official capacity, instituted either of his own motion on behalf of the public, or at the relation of some person aggrieved, and claiming an injunction to restrain the continuance of the nuisance (a).

A private individual cannot bring an action in respect of a public nuisance except with the sanction and in the name of the Attorney-General, unless (b)—

- (i) it also interferes with some private right of his own, as, *e.g.*, where his private right of access from his premises to the highway is obstructed for an unreasonable time and in an unreasonable manner by building operations carried on by the defendant (c); or
- (ii) he thereby suffers some damage which is direct and substantial and particular to himself beyond that which is suffered by the rest of the public.

Thus, in *Benjamin v. Storr*, the plaintiff had a coffee shop in a narrow street. The defendants had an outlet from their premises near to the plaintiff's shop and, for the purpose of loading and unloading their goods, had horses and waggons standing in the street outside the plaintiff's shop from about 8.30 a.m. to 7 or 8 p.m. The results were that the approach to the plaintiff's shop was obstructed so as to deter customers from coming, the light was diminished so that it was necessary to use gas nearly all day, and the offensive smells arising from the horses standing on the highway rendered the plaintiff's premises unhealthy and incommodious. *Held*, that the plaintiff had

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(a) *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752; 51 L. J. Ch. 746; *Wallasey Local Board v. Gracey*, 36 Ch. D. 598; 56 L. J. Ch. 739.

(b) See *Boyce v. Paddington Borough Council*, [1903] 1 Ch., at p. 114; 73 L. J. Ch. 28, reviewing the authorities.

(c) *Frits v. Hobson*, 14 Ch. D. 542; 49 L. J. Ch. 785, and see *Lyon v. Fishmongers' Co.*, 1 A. C. 662; 46 L. J. Ch. 68.

suffered particular, direct and substantial damage entitling him to maintain an action (d).

For a private nuisance, the person aggrieved may bring an action claiming damages and, in a proper case, an injunction to restrain its continuance.

An action for either a public nuisance or a private nuisance is an action of *case* based upon the injury or damage caused by the unjustifiable conduct of the defendant.

There is a further difference between public and private nuisances in that the right to commit a public nuisance cannot be acquired by prescription (e) but the right to do what would otherwise amount to a private nuisance may be acquired as an easement. Thus a right to foul a stream may be acquired by prescription (f).

**Abatement.**—Either a public or a private nuisance may also, subject to certain conditions, be abated by the removal of that which causes the nuisance.

In the case of a public nuisance abatement is justifiable only where it causes some special and particular injury to the person abating it (g) and where its abatement is necessary in order to enable his rights to be exercised (h).

A private nuisance may always be abated provided that it is not necessary to enter upon the land of the party who is responsible for its existence. Thus, if trees on one man's land cause a nuisance by overhanging the land of another, the latter is entitled to cut them; and, if he can cut them from his own land, without committing a trespass by entering upon the land of his neighbour, he is entitled to do so at any time without notice.

But, if a person desires to abate a nuisance which can be abated only by going on the land of the person from whom the nuisance proceeds, he must, except in a case of emergency and where it is a nuisance by omission give notice of his intention to do so (i).

(d) *Benjamin v. Storr*, 11 R. 9 C. P. 400; 43 L. J. C. P. 162. Cp. *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138; 99 L. J. Ch. 84; *Harper v. G. N. Haden & Co.*, [1933] 1 Ch. 298; 102 L. J. Ch. 6.

(e) *Deucll v. Saunders*, Cro. Jac. 490; *R. v. Cross*, 3 Camp. 224.

(f) See *Wood v. Waud*, 3 Ex. 748; 18 L. J. Ex. 305.

(g) *Dimes v. Pelley*, 15 Q. B., at p. 283; 19 L. J. Q. B. 449; and see *Chichester Corporation v. Prooke*, 7 Q. B. 339; 15 L. J. Q. B. 59.

(h) *Bateman v. Bluck*, 18 Q. B. 870; 21 L. J. Q. B. 406.

(i) *Lemmon v. Webb*, [1895] A. C. 1; 64 L. J. Ch. 205; *Lagan Navigation Co. v. Lambeg, etc., Co.*, [1927] A. C. at p. 245. See, however, *Jones*

If there are two ways of abating a nuisance, the least mischievous must be chosen, and if by one of these alternative methods some wrong would be done to an innocent third party or to the public, that method cannot be justified at all (k).

Moreover, "the abatement of a nuisance is a remedy which the law does not favour and is not usually advisable, and . . . its exercise destroys any right of action in respect of the nuisance" (l).

### SUB-SECTION 1.—Public nuisances

A public or common nuisance is an unlawful act or omission to discharge a legal duty, the effect of which is to endanger the life, health, property, morals, or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all his Majesty's subjects (m). Thus, anything which interferes with the comfort, enjoyment, or health of the public, or which is dangerous to the public safety, is a public nuisance, as, for example, the accumulation of filth upon waste land (n), or the carrying on of a noxious or offensive trade (o), or the establishment of a smallpox hospital so as to expose the public to infection (p). The most important class of public nuisances for present purposes is that of highway nuisances.

*Highway nuisances.*—Any permanent and unauthorised obstruction of the use (q) of a highway, which renders it less

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v. *Williams*, 11 M. & W. 176; 12 L. J. Ex. 249; 63 R. R. 564, where it was also held that an entry upon the land of another to remove a nuisance caused by filth is justifiable without notice, when the owner of the land is an original wrongdoer by putting it there, or possibly where the nuisance arises from his default in the performance of some obligation incumbent upon him.

Where the branches of fruit trees upon the land of A overhang the land of B, the right of B to lop the branches does not carry with it the right to pick and appropriate the fruit, and if he does so he is guilty of a conversion: *Mills v. Brooker*, [1919] 1 K. B. 555; 88 L. J. K. B. 950; 121 L. T. 254.

(k) *Roberts v. Rose*, L. R. 1 Ex., at p. 89; 88 L. J. Q. B. 249; 10 L. T. 602; *Lagan Navigation Co. v. Lambeg, etc., Co.*, [1927] A. C., at p. 245; 96 L. J. P. C. 25.

(l) *Lagan, etc., Co. v. Lambeg, etc., Co.*, [1927] A. C., at p. 244.

(m) Archbold's Criminal Law, *Public Nuisance*. "A common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects, or by neglecting to do a thing which the common good requires" (Hawkins' Pleas of the Crown (8th ed.), vol. i, p. 692, cited and approved in *Att.-Gen. v. Tod Heatley*, [1897] 1 Ch., at p. 566; 66 L. J. Ch. 276).

(n) *Att.-Gen. v. Tod Heatley (ubi supra)*.

(o) *R. v. Garland*, 5 Cox 165; *R. v. Neil*, 2 C. & P. 485; 81 R. R. 685; *R. v. Watts*, 2 C. & P. 486; 81 R. R. 686; *Att.-Gen. v. Cole*, [1901] 1 Ch. 205; 70 L. J. Ch. 148.

(p) *Metropolitan Asylums District v. Hill*, 6 A. C. 128.

(q) *R. v. Bartholomew*, [1908] 1 K. B. 554; 77 L. J. K. B. 275; *Noble v. Harrison*, [1926] 2 K. B. 892; 95 L. J. K. B. 818. But in *Dwyer v. Mansfield*,

commodious than before to the public is a nuisance, as, for example, obstruction by a theatre queue (r) or by crowds attracted by effigies in a shop window (s).

An interference with the general right of passage is none the less a nuisance though it is caused by an act which is for the benefit of the public, or though the general benefit may outweigh the general inconvenience. Where, therefore, a highway was rendered less convenient to the general public by the construction of a tramway without legal authority, it was held to be no defence that the tramway was a considerable benefit to a large part of the public (t).

But a temporary obstruction incidental to the use of property, as by the use of a coalhole in a pavement, or the erection of a hoarding for repairs, does not amount to a nuisance, provided that the inconvenience is not unreasonable in extent or prolonged for an unreasonable time (u). And a highway may be dedicated subject to something which would otherwise be a nuisance, in which case the public must take it subject to the risk and inconvenience arising from its existing state when dedicated (x).

Again, anything on or near the highway which is a source of danger to persons actually using the highway (y) constitutes a public nuisance. Instances of this class of nuisances are—

(i) ruinous premises adjoining a highway (z);

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[1916] K. B. 437; 62 T. L. R. 401, it was held that no nuisance was caused by a queue of customers waiting outside a shop for goods in short supply and rationed by the shopkeeper, the queue not being occasioned by him but by the short supply.

(r) *Lyons, Sons & Co. v. Gulliver*, [1914] 1 Ch. 681; 88 L. J. Ch. 281, approving *Barber v. Penley*, [1898] 2 Ch. 447; 62 L. J. Ch. 628.

(s) *R. v. Carlile*, 6 C. & P. 636; 40 R. R. 882; compare *R. v. Moore*, 3 B. & Ad. 184; 1 L. J. M. C. 80; 37 R. R. 889. A navigable river is a public highway (*Golchester Corporation v. Brooke*, 7 Q. B., at p. 860; 15 L. J. Q. B. 59; *Att.-Gen. v. Terry*, L. R. 9 Ch. 423).

(t) *R. v. Train*, 2 B. & S. 640; 31 L. J. M. C. 169; 127 R. R. 513; and see *R. v. Longton Gas Co.*, 2 E. & E. 651; 29 L. J. M. C. 118; 119 R. R. 889. Such undertakings are usually carried out under statutory powers, as to which see *ante*, p. 269.

(u) See *Herring v. Metropolitan Board of Works*, 19 C. B. (N.S.), at p. 525; 147 R. R. 683; *Att.-Gen. v. Brighton, etc., Co-operative Association*, [1900] 1 Ch. 276; 69 L. J. Ch. 904; *Harper v. G. N. Haden & Sons, Ltd.*, [1933] 1 Ch. 298; 103 L. J. Ch. 6 (reviewing the authorities). But a person who opens a cellar in a highway is bound to take reasonable precautions to protect the public, and in default is liable to an action of negligence (*Daniels v. Potter*, 4 C. & P. 362; 31 R. R. 794; *Pickard v. Smith*, 10 C. B. (N.S.) 470; 128 R. R. 790).

(x) *Fisher v. Prowse*, 2 B. & S. 770; 31 L. J. Q. B. 212; 127 R. R. 547.

(y) See *Bromley v. Mercer*, [1922] 2 K. B. 126; 91 L. J. K. B. 577.

(z) *Tarry v. Ashton*, 1 Q. B. D. 314; 45 L. J. Q. B. 260; *ante*, p. 302.

- (ii) a spiked wall (a) or rotten fence (b) adjoining a highway and dangerous to persons using the highway;
- (iii) an excavation so near a highway as to be dangerous to persons accidentally deviating from the highway (c);

Thus, in *Barnes v. Ward* (c), the plaintiff fell at night into an area which had been made in the course of building a house and had been left unfenced though separated from the highway only by a kerbstone intended for railings. *Held*, that the excavation was a public nuisance even though the danger consisted in the risk of accidentally deviating from the road, for such a risk might deter prudent persons from using the road and so impede its full enjoyment by the public.

On the other hand, in the later case of *Hardcastle v. South Yorkshire Ry.* (d), it was held that a plaintiff could not recover where he wandered some distance from a highway and fell into an open pit on the defendant's land, and it was pointed out that the true test is "whether the excavation be substantially adjoining the way" so as to be a danger to a person who might be thrown into it "by making a false step or being affected with sudden giddiness".

- (iv) a dangerous thing, such as a fire pail containing molten lead (e), or an unlighted vehicle (f) left unguarded on the highway;
- (v) a steam plough obstructing a highway and causing a horse to shy and run away (g), or a roller (h) or heap of earth (i) placed at the side of a highway with the same result;
- (vi) a steam traction engine driven along the highway and setting fire to hayricks by sparks which escaped from it (k);
- (vii) a mass of snow eighteen inches thick allowed to remain for four days on a sloping roof overhanging a public

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(a) *Fenna v. Clare*, [1895] 1 Q. B. 199; 64 L. J. Q. B. 288.  
 (b) *Harrold v. Watney*, [1898] 2 Q. B. 320; 67 L. J. Q. B. 771; *Drake v. Bedfordshire County Council*, [1944] 1 K. B. 620; 113 L. J. K. B. 828.  
 (c) *Barnes v. Ward*, 9 C. B. 392; 19 L. J. C. P. 195; 82 R. R. 375.  
 (d) 4 H. & N. 67; 28 L. J. Ex. 189; 118 R. R. 381.  
 (e) *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 38; 85 L. J. K. B. 172.  
 (f) *Ware v. Garston Haulage Co.*, [1944] 1 K. B. 80; 113 L. J. K. B. 45.  
 (g) *Harris v. Mobbs*, 3 Ex. D. 268.  
 (h) *Wilkins v. Day*, 12 Q. B. D. 110.  
 (i) *Brown v. Eastern and Midlands Ry.*, 22 Q. B. D., at p. 302; 58 L. J. Q. B. 212.  
 (k) *Powell v. Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428. In this case, the defence was that, since the use of the traction engine upon the highway was authorised, no action would lie in the absence of negligence. It was, however, held that the authority given by the statute was merely a qualified authority, which, unlike the authority given by the Railway Acts, preserved all Common Law liabilities.

street in a large city and liable to fall at any time on the heads of persons lawfully using the street below (l).

The Highways Act, 1885, and other later statutes contain numerous provisions, which are outside the scope of this book, relating to obstacles, obstructions and nuisances upon or near highways and the fencing of quarries, pits and excavations near highways. Powers are also given to local authorities to require the abatement of such statutory nuisances, and the failure to abate them after being called upon to do so may render a defendant liable although he would not be liable at Common Law (m).

#### SUB-SECTION 2.—*Private nuisances*

The right of action for a private nuisance supplements the right of action for trespass to land. It applies to circumstances in which, although the defendant has not trespassed upon the plaintiff's property, he has been guilty of "a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or, in some cases, owned by himself" (n).

To give rise to a cause of action for a private nuisance there must be both *damnum* and *injuria*, that is to say, the plaintiff must prove that he has suffered some harm or damage *and* that it was caused by some violation of his legal rights. The mere fact that a person has suffered harm or damage is not sufficient to give him a right of action; "there must be some right in the person damaged to immunity from the damage complained of" (o).

There are, accordingly, as we have already seen, many ways in which, although a man's enjoyment of his property may be injuriously affected by the use made of his neighbour's land, he will nevertheless have no remedy because there has been no infringement of any legal right which he possesses. One instance of this has already been mentioned with regard to water (p), but there are many others: Thus, unless a man has a right of support for buildings on his land he cannot complain if their support is withdrawn by operations on his neighbour's land (q). Similarly,

(l) *Slater v. Worthington's Cash Stores, Ltd.*, [1941] 1 K. B. 488; 111 L. J. K. B. 91.

(m) See *Gully v. Smith*, 12 Q. B. D. 121; 53 L. J. M. C. 25, and *Hudson v. Bray*, [1917] 1 K. B. 520; 86 L. J. K. B. 576.

(n) *Sidhu-Dinhd v. O'Callaghan*, [1910] A. C., at pp. 896, 897; 100 L. J. K. B. 893; *Read v. J. Lyons & Co., Ltd.*, [1945] 1 K. B., at p. 286.

(o) See *Hamulton v. Dyson (Earl)*, [1916] 1 A. C., at p. 84; 85 L. J. Ch. 33.

(p) *Iute*, p. 272.

(q) *Post*, p. 355.

unless he has a right to the light that comes through his window he cannot complain if that light is diminished or taken away by his neighbour (r). And, if he is carrying on a business he cannot complain merely because his neighbour begins to carry on a business which competes with and injures his business (s).

Private nuisances are of two main classes, namely (1) those which cause harm by a substantial interference with the enjoyment of property, and (2) those which cause appreciable injury to property (t). In occasioning either class of nuisance a person acts at his peril and is therefore liable whether or not it is due to negligence on his part. Nuisances are in most cases akin to trespass in that they are due to something created by or belonging to the defendant and escaping from his premises to those of the plaintiff. The action of trespass was limited to acts of the defendant or his cattle but the escape of deleterious matter belonging to him was treated as analogous to the escape of cattle (u), and grounded an action for any nuisance thereby caused.

1. The first class of cases consists principally of nuisances arising from such matters as noise, smoke or smell.

In nuisances of this character the rights of the plaintiff are qualified by the rights of the defendant to use his premises in an ordinary and reasonable manner, and so long as the defendant does this there is no *injuria*. Hence "there are always two things to be considered, the right of the plaintiff and the right of the defendant" (w); the affairs of life cannot be carried on without mutual sacrifices of comfort and "the law must regard the principle of mutual adjustment" (x).

If a defendant is merely using his house for ordinary purposes there is nothing that can be regarded in law as a nuisance (y). So "if my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which beyond fair

(r) *Post*, p. 857.

(s) *Hammerton v. Dysart (Earl)*, *ubi supra*.

(t) *St. Helens Smelting Co. v. Tipping*, 11 H. L. C. 641; 35 L. J. Q. B. 66. See also *Fay v. Prentice*, 1 C. B. 828; 14 L. J. C. P. 298.

(u) See *Tenant v. Goldwin*, 1 Salk. 360; *Rylands v. Fletcher*, L. R. 3 H. L., at p. 340.

(w) *Ball v. Ray*, L. R. 8 Ch. 467, at p. 469.

(x) *Cavey v. Ledbitter*, 18 C. B. (N.S.), at p. 476; 32 L. J. C. P. 104.

(y) *Ball v. Ray* (*ubi supra*).



controversy ought to be regarded as excessive and unreasonable" (a).

In this class of cases the plaintiff must therefore prove that he has been subjected to "sensible discomfort and annoyance" (a), regard being had "to the habits and requirements of ordinary people" (b) and to the character of the locality (c).

Thus "a dweller in towns cannot expect to have as pure air, as free from smoke, smell, or noise as if he lived in the country . . . and yet an excess of smoke, smell or noise may give a cause of action, but in each of such cases it becomes a *question of degree*, and the question is in each case whether it amounts to a nuisance which will give a right of action" (d).

But the law also takes into consideration both the duration and the object of that which is said to constitute the nuisance. Thus, on the one hand, a mere temporary inconvenience caused by the execution of lawful works in the ordinary user of land (as, e.g., dust and noise caused by rebuilding operations) does not constitute a nuisance (e).

On the other hand, noise made deliberately and maliciously for the purpose of annoying a neighbour may amount to a nuisance.

Thus, in the case of *Christie v. Davey*, the plaintiff was a teacher of music and singing, the noise of which annoyed the defendant who, in consequence, wrote an exaggerated letter of complaint to the plaintiff, and, on receiving no answer, began to make a series of offensive noises in his own house—such as beating on trays, whistling and shrieking—whenever the playing of music was going on in the plaintiff's house. The plaintiff accordingly brought an action for an injunction to restrain the defendant from making those noises, upon which the defendant counter-claimed for an injunction to restrain the plaintiff from giving music lessons. It was held (i) that, upon the facts, nothing done by the plaintiff had gone beyond a legitimate use of his house so as to amount to a nuisance, but (ii) that the noises made by the defendant were not legitimate and that an injunction must be granted to restrain him from making such noises so as to vex or annoy the plaintiff (f).

(c) *Gaunt v. Fynney*, L. R. 8 Ch., at p. 12; 42 L. J. Ch. 122.

(a) *Fleming v. Halsey*, 11 A. C., at p. 697.

(b) *Colls v. Home & Colonial Stores, Ltd.*, [1904] A. C., at p. 209; 73 L. J. Ch. 484.

(c) *Sturges v. Bridgman*, 11 Ch. D., at p. 865; 48 L. J. Ch. 785. "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." See also *Polsue & Alfieri v. Rushmer*, [1907] A. C. 121; 76 L. J. Ch. 365, *Hammerton v. Dysart (Earl)*, [1916] 1 A. C., at p. 86.

(d) *Colls v. Home & Colonial Stores, Ltd.*, [1904] A. C., at p. 185.

(e) *Harrison v. Southwark, etc., Water Co.* [1891] 2 Ch., at pp. 413, 414; 60 L. J. Ch. 630; 61 L. T. 861; *Hammerton v. Dysart (Earl)* (*ubi supra*). Compare the similar rule as to public nuisances, *ante*, p. 338.

(f) [1893] 1 Ch. 316; 62 L. J. Ch. 439. It was, however, suggested by the

Again, in *Hollywood Silver Fox Farm, Ltd. v. Emmett*, the plaintiff was the owner of premises upon which he bred silver foxes. During the breeding season the vixens are extremely nervous and any loud unusual noise is likely to put them off mating for the season or to bring about a miscarriage or to cause them to kill or eat their young. The defendant having quarrelled with the plaintiff, maliciously caused his son to discharge guns as near as possible to the plaintiff's breeding pens for the purpose, as was found, of frightening the vixens. As a result the plaintiff sustained serious damage. *Held*, that the plaintiff was entitled to damages and an injunction (g).

The acts of two or more persons acting independently of one another may in the aggregate constitute a nuisance, for which each is severally liable.

Thus, in *Lambton v. Mellish & Cox (h)*, the plaintiff was the owner of a house adjoining a common upon which, during the summer months, a large number of excursionists congregated. The defendants were the rival owners of organs used in connection with merry-go-rounds in such a way that the total noise was a nuisance. *Held*, that, although the total noise caused by each defendant's unaided efforts might not amount to a nuisance, each was nevertheless "amenable to the remedy against the aggregate cause of complaint".

2. In the second class of cases, a very different consideration arises. The principle that persons living in society must submit to that amount of discomfort and annoyance which is caused by the legitimate user of their neighbour's property does not apply to circumstances the result of which is sensible injury to their own property; and if a defendant so uses his property as to cause such injury, it is no answer to say that it was caused by legitimate user (i). Instances of this class of injury are—

- (i) damage to the plaintiff's trees, shrubs, fruit and herbage through fumes from the works of a copper smelting company (k);
- (ii) damage caused by a stove in the defendant's house which rendered a cellar in the house of the plaintiff, who was an hotel-keeper, unfit for keeping wine (l);

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Court that the playing in the plaintiff's house should cease at 11 p.m., or as soon as possible afterwards.

(g) [1936] 2 K. B. 468; following *Keeble v. Hickeringill*, 11 Mod. 74.

(h) [1894] 3 Ch. 163; 63 L. J. Ch. 929.

(i) *St. Helens Smelting Co. v. Tipping*, 11 H. L. C. 642, at p. 650; 35 L. J. Q. B. 66; 12 L. T. 776

(k) *St. Helens Smelting Co. v. Tipping (ubi supra)*.

(l) *Reinhardt v. Mentasti*, 42 Ch. D. 685; 63 L. J. Ch. 787.

- (iii) injury to the plaintiff's well by the escape of sewage from the defendant's land (m);
- (iv) damage to the plaintiff's crops through the overhanging trees of the defendant (n), or to the plaintiff's house through roots of his neighbour's trees burrowing under it (o).

But, in order to establish his case, the plaintiff must show that he has suffered damage which is (i) substantial, i.e., such as does not depend upon minute scientific tests, but "can be shown by a plain witness to a plain common jurymen"; and (ii) which is actual and not merely "contingent, prospective or remote" (p).

And, where the defendant does something which is not in itself noxious and would not injure any ordinary trade or property, he is not liable as for a nuisance because he causes injury to something which is peculiarly sensitive (q).

Many nuisances of this class may also fall within the rule in *Rylands v. Fletcher*, which will be discussed later.

A nuisance is none the less a nuisance because it existed before the plaintiff was living in the neighbourhood (r). Where, however, a locality has for a long time been devoted to noisy or offensive trades or businesses, neither an indictment (s) nor an action (t) will lie unless there is such an increase of annoyance and inconvenience as is unjustifiable, having regard to the local standard.

**Who may sue and be sued for a nuisance.**—For a private nuisance, as for a trespass, an action can be maintained by anyone in possession of the land or premises whose enjoyment is affected by the nuisance, however small his interest (u), but not

(m) *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454.

(n) *Smith v. Giddy*, [1904] 2 K. B. 448; 73 L. J. K. B. 894.

(o) *Butler v. Standard Telephones, etc., Ltd.*, [1904] 1 K. B. 399; 109 L. J. K. B. 238.

(p) *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705; 44 L. J. Ch. 119; 31 L. T. 154.

(q) *Robinson v. Kilvert*, 41 Ch. D. 88; 58 L. J. Ch. 392.

(r) *Bliss v. Hall*, 4 Bing. N. C. 183; 7 L. J. C. P. 182; 44 R. R. 697. "Whether the man went to the nuisance or the nuisance came to the man, the rights are the same": *Fleming v. Hyslop*, 11 A. C., at p. 697.

(s) *R. v. Watts*, M. & M. 281; and see *R. v. Neville*, Peake 91; 3 R. R. 662.

(t) *Polvue v. Alfieri, Ltd. v. Rushmer*, [1907] A. C. 121; 78 L. J. Ch. 365.

(u) See *Jones v. Chappell*, L. R. 20 Eq. 539; 44 L. J. Ch. 658.

by a mere licensee with no proprietary or possessory interest such as, *e.g.*, the wife of the occupier (*x*). A reversioner can, however, sue in respect of a nuisance which causes injury of a permanent character but not in respect of a temporary nuisance (*y*).

The owner of land or premises is liable if he has let them with a nuisance on them (*a*) or with authority to do something likely to cause a nuisance (*b*).

The occupier of land or premises is liable for a nuisance existing thereon if it is created or authorised by him or if he has "continued or adopted" it by failing, without undue delay, to remedy it when he became aware of it or with reasonable care should have become aware of it: with regard to this liability there is no difference between public and private nuisances (*c*).

In the case of a *public nuisance* caused by non-repair of the premises the occupier of the premises is liable whether or not he knows or ought to have known of it and whether or not the owner of the premises is also liable; the owner is also equally liable if he has covenanted to do the repairs or has reserved the right to enter and do them (*d*).

## SECTION 2.—Nuisances within *Rylands v. Fletcher* (*e*)

In this case the defendant constructed a reservoir on his land in ignorance of the fact that there existed under it old mine workings connected with the plaintiff's colliery. When the reservoir was filled the water flowed into the plaintiff's colliery. The defendant contended that he was not liable in the absence of negligence but it was held that his liability for the nuisance caused by the escape of the water (*f*) was absolute and independent of negligence. "If a person brings or accumulates on his

(*x*) *Malone v. Laskey*, [1907] 2 K. B. 141; 76 L. J. K. B. 1184; *Cunard v. Antifire, Ltd.*, [1933] 1 K. B. 551.

(*y*) *Simpson v. Savage*, 1 C. B. (N.S.) 317; 26 L. J. C. P. 50; 107 R. R. 688; *Mumford v. Oxford, etc., Ry.*, 1 H. & N. 34, 25 L. J. Ex. 265; 108 R. R. 439; *Jones v. Llanrwst Urban District Council*, [1911] 1 Ch. 393; 80 L. J. Ch. 145.

(*a*) *R. v. Pedley*, 1 Ad. & E. 822.

(*b*) *Harris v. James*, 45 L. J. Q. B. 516; see also *Jenkins v. Jackson*, 40 Ch. D. 71.

(*c*) *Sedley-Denfield v. O'Callaghan*, [1940] A. C. 881; 109 L. J. K. B. 893 (reviewing the authorities).

(*d*) *Wringe v. Cohen*, [1940] 1 K. B. 229; 109 L. J. K. B. 227 (reviewing the authorities).

(*e*) L. R. 8 H. L. 380; 37 L. J. Ex. 161.

(*f*) "The nuisance is . . . on the water escaping"; *Fletcher v. Rylands*, 3 Ex. at p. 789.

land anything which if it should escape, may cause damage to his neighbour, he does so at his peril" (g). The general rule was thus stated by Blackburn, J., "The person whose grass or corn is eaten down by the escaping cattle of his neighbour or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and poisonous vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was *not naturally there*, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which occurs if he does not succeed in confining it to his own property. . . . And this we think to be established to be the law whether the things so brought be beasts or water or filth or stench" (h).

This principle has been applied in many cases—*e.g.*,

to the escape of water which had accumulated in a cellar dug by the defendant (i),

to the escape of fire (k), electricity (l), and sewage (m),

to yew trees planted by the defendant and projecting over adjoining property so that they poisoned cattle that ate the leaves (n),

to decayed strands of a wire fence which were allowed to fall into adjoining pasture and were swallowed by cattle grazing there (o),

to colliery refuse (p),

to damage caused to neighbouring property by an

(g) L. R. 3 H. L., at p. 340.

(h) L. R. 1 Ex., at p. 290; affirmed by Lord Cairns, L. R. 3 H. L., at p. 339.

(i) *Snor v. Whitehead*, 27 Ch. D. 588; 58 L. J. Ch. 885.

(k) *Jones v. Festiniog Ry.*, L. R. 3 Q. B. 738; 37 L. J. Q. B. 214; 18 L. T. 902.

(l) *National Telephone Co. v. Baker*, [1898] 2 Ch. 186; 62 L. J. Ch. 699; *Eastern, etc., Co. v. Cape Town, etc., Co.*, [1902] A. C. 381.

(m) *Humphries v. Cousins*, 2 C. P. D. 289; 46 L. J. C. P. 438; *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 383; 60 L. J. Ch. 145.

(n) *Crowthurst v. Amersham Burial Board*, 4 Ex. D. 5; 48 L. J. Ex. 109.

(o) *Firth v. Bowling Iron Co.*, 3 C. P. D. 254; 47 L. J. C. P. 358; following *Humphries v. Cousins* (*ubi supra*).

(p) *Att.-Gen. v. Cory Bros. & Co.*, [1921] 1 A. C. 521; 90 L. J. Ch. 221.

explosion on the defendants' land of explosives there stored by them (q),

to vibrations set up by building operations on the defendant's land and causing damage to adjoining property (r).

But, for the rule to apply there must be an "escape" from the premises of the defendant to the premises of the plaintiff. So, in *Read v. J. Lyons & Co. Ltd.* (s) it was held not to apply where an inspector of munitions while on the premises of the respondents in the course of his duties was injured by the explosion of a shell.

The rule applies not only where the defendant has brought upon his land that which has escaped and done mischief, but where, though he did not in the first instance bring it upon his land, he has by any *artificial* means *accumulated* it there—as, for example, where the defendant raised on his land a large mound of earth and rubble, which collected and accumulated water and caused it to flow into the plaintiff's land in a manner in which it would not have done but for the artificial erection on the defendant's land (t).

But the rule does not apply unless the defendant has used his land "for a *non-natural* use, for the purpose of introducing into it or collecting upon it *that which in its natural condition was not in or upon it or so collected upon it*" (u).

A landowner is not therefore liable if, as a result of the natural user of his land, water which naturally exists or accumulates there flows by gravitation into his neighbour's land.

Thus, in the case of *Smith v. Kenrick* (a), the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that water percolating through the upper mine flowed into the

(q) *Rainham, etc., Works, Ltd. v. Belvedere, etc., Co.*, [1921] 2 A. C. 465; 90 L. J. K. B. 1252.

(r) *Hoare & Co. v. McAlpine*, [1928] 1 Ch. 167; 92 L. J. Ch. 81. It has also been applied where the defendant allowed caravan dwellers to camp upon his property whence they "escaped" and through their offensive and unsanitary habits became a nuisance to the neighbourhood: *Att.-Gen. v. Corke*, [1933] Ch. 89; 102 L. J. Ch. 90. The ground of this decision appears to be that caravan dwellers constitute a class of persons likely to do the things complained of.

(s) [1947] A. C. 156; [1947] L. J. R. 39. The expression "premises of the defendant" includes premises over which the defendant was in control when the escape occurred, see *North Western Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108, where it was held to include gas mains laid by the defendants in the streets of a city in the exercise of a franchise to do so.

(t) *Hurdman v. North Eastern Ry.*, 3 C. P. D. 168; 47 L. J. C. P. 368.

(u) *Rylands v. Fletcher*, L. R. 3 H. L., at p. 339.

(a) 7 C. B. 515; 18 L. J. C. P. 172.

lower mine. It was held that the owner of the lower mine had no ground of complaint, the defendant having a right to remove all his coal and the damage to the plaintiff being caused by the natural percolation of water from the upper strata, against which the defendant was not bound to protect the plaintiff.

But, in the case of *Baird v. Williamson* (b), where the defendant altered the condition of his land by *pumping* water from the lower levels of his mine to the upper levels, whence it flowed into the plaintiff's mine, it was held that he had no right thus to interfere with the gravitation of the water.

So also it has been held that a defendant is not liable  
for the escape of thistle seeds growing naturally on his  
land (c),  
for the fall of rocks from his land as a result of natural  
causes, such as weathering (d),  
for the escape of wild rabbits (e),

Nor does the principle apply—

- i. Where the cause of its escape was the act of God or the King's enemies (f), or the malicious act of a third person (g).

So, in *Nichols v. Marsland* (f), the defendant was held not liable for damage caused by water which overflowed from artificially made pools on his land, the flood being "the effect of an extraordinary act of nature which she could not anticipate".

- ii. Where the escaping matter is brought or kept upon the defendant's land by the consent of the plaintiff, as, e.g., where water is kept by a landlord in a cistern for the benefit of himself and a tenant occupying the same premises or is supplied by a landlord to premises for

(b) 15 C. B. (N.S.) 376; 33 L. J. C. P. 101; 9 L. T. 412. This and the preceding case are compared and discussed in *Rylands v. Fletcher* and form the basis of the judgment. Another pair of cases in the first of which the defence of natural user succeeded, and in the second of which it failed, is *Wilson v. Waddell*, 2 A. C. 95, and *Fletcher v. Smith*, 2 A. C. 781; 47 L. J. Ex. 4.

(c) *Giles v. Walker*, 24 Q. B. D. 656; 59 L. J. Q. B. 416. See also *Wilson v. Newberry*, L. R. 7 Q. B. 31; 41 L. J. Q. B. 31.

(d) *Pontardawe Rural Council v. Moore Gwyn*, [1929] 1 Ch. 656; 98 L. J. Ch. 242; 141 L. T. 23; 45 T. L. R. 276.

(e) *Boulston's Case* (1597), 5 Co. Rep. 104b. This case was followed in *Stearn v. Prentice Brothers, Ltd.*, [1919] 1 K. B. 394; 88 L. J. K. B. 422, in which the defendant, a bone-manure manufacturer, was held not liable for damage caused by rats, which were attracted by the bones, and, in going to and from his premises, crossed the plaintiff's land and ate his corn. But an action may be maintained against any person who collects animals upon his land so as to injure his neighbour's crops (*Farrer v. Nelson*, 15 Q. B. D., at p. 260; 51 L. J. Q. B. 385).

(f) *Nichols v. Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174.

(g) *Rickards v. Lothian*, [1913] A. C. at p. 278; 82 L. J. P. C. 142.

the common benefit of several tenants. In such cases the tenant and, in the latter case, each tenant "consents to the presence . . . of the installed water system with all its advantages or disadvantages". This principle applies whether or not the water is so kept or supplied for ordinary domestic purposes or for extraordinary purposes, as in the case of a sprinkler system installed as a precaution against fire and designed to discharge large quantities of water (*h*).

But although a person is not liable for the mere escape of something which he did not bring on his land, he will be liable if he actively transfers to his neighbour a mischievous substance which has collected on his land. Thus, where a quantity of rainwater accumulated against a railway embankment and the railway company, in order to protect the embankment, cut a trench through

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(*h*) *Peters v. Prince of Wales Theatre (Birmingham), Ltd.*, [1949] 1 K. B. 78 (reviewing the authorities).

It has been suggested in some cases that, even where things have been artificially brought or collected upon the defendant's land, he is not liable under the principle of *Rylands v. Fletcher* if he is only putting his land to a "natural" or "ordinary use".

Thus in *Rickards v. Lothian*, the defendant was the lessee of premises which he let to sub-tenants. One of these sub-tenants suffered damage through the overflow of water from an ordinary domestic tap by the malicious act of a third person. *Held*, that (apart from the fact that the damage was so caused) the defendant was not liable at all under the rule in *Rylands v. Fletcher* because, in having on his premises such a water supply, he was only using them in an ordinary and proper manner.

Such user is not, however, the same as the "natural user" of *Rylands v. Fletcher*. There is no trace of this in the judgment of Blackburn, J., in the Court of Exchequer, which is based simply on "the general rule of law that he whose stuff it is must keep it in" (L. R. 1 Ex., at p. 286). In the House of Lords Lord Cranworth makes no reference to natural or ordinary user. Lord Cairns speaks of the right of the defendant to make a natural use of the land but does so only to contrast it with the non-natural use of introducing into the land something which in its natural condition was not there (see *ante*, p. 846). The illustration given by him and by Lord Cranworth of natural user is the case *Smith v. Kendrick* and of non-natural user the case of *Baird v. Williamson* (*ante*, p. 848). Both are cases in which the plaintiff was damaged by water flowing on to his premises as a result of mining operations by the defendant. The essential difference between these cases is that in the first case the damage was occasioned by the natural flow of water which was on the defendant's land in its *natural condition*; in the second case the water had been pumped up by the defendant and so artificially brought up to the level from which it overflowed and which it would not have reached if the defendant's land had been used in its natural condition.

It may be added that, if such "natural" or "ordinary" user is a defence, it is difficult to see why a defendant should be liable for the escape of his cattle, or in respect of a privy, the liability for which was a *ratio decidendi* in *Rylands v. Fletcher* (L. R. 1 Ex., at pp. 282, 288). As to such user as a defence where damage is caused, see also *ante*, p. 84b.



it which transferred the water to the plaintiff's land, it was held that the company was liable for the damage so done (i).

On the other hand, a landowner is not liable if, as a result of protective measures which he takes to prevent a dangerous substance from getting on his land, it gets on to his neighbour's land in greater quantities than it would otherwise have done (k).

Thus, in *Greyvensteyn v. Hattingh* (l), the defendant was held not liable because in driving a flight of locusts away from his farm he had turned their course of flight to the plaintiff's land.

Finally, it must again be emphasised that the liability for nuisance is *additional* to the liability for negligence, and that any owner or occupier of land who executes on his land work which entails the risk of injury to his neighbours is bound to take every reasonable precaution to protect his neighbours from injury (m); and, in dealing with things that are likely to cause damage unless adequate precautions are taken, the line of demarcation between the proof of negligence and the proof of what is necessary to bring such a case within the principle of *Rylands v. Fletcher* is but a faint one (n).

## SECTION 2.—*Interference with Natural Rights and Easements*

Every landowner has, as incidental to his rights of ownership over the land, certain natural rights. Thus, all riparian proprietors have by virtue of their ownership of the land through which the water flows, certain natural rights to enjoy the flow of water in the stream.

An easement, on the other hand, is a right which the owner of one tenement (termed the dominant tenement) has acquired over another (termed the servient) tenement. It is a right enjoyed by the owner of the dominant tenement in respect of that tenement, and is a right whereby he is entitled to do some act upon the servient tenement, as in the case of a private right of way, or to compel the owner of the servient tenement to refrain from using it in a particular manner, as, *e.g.*, from obstructing

(i) *Whalley v. Lancashire and Yorkshire Ry.*, 13 Q. B. D. 181; 58 L. J. Q. B. 285.

(k) *Ante*, p. 272.

(l) [1911] A. C. 355; 80 L. J. P. C. 158.

(m) *Dodd v. Holme*, 1 Ad. & El. 498; 40 R. R. 344; *Bower v. Peate*, 1 Q. B. D. 331; 15 L. J. Q. B. 446; *Hughes v. Percival*, 8 A. C. 448; 52 L. J. Q. B. 719.

(n) *Att.-Gen. v. Cory Bros. & Co.*, [1921] 1 A. C., at p. 586; 90 L. J. Ch. 221; 125 L. T. 98. See also *Edwards, Ltd. v. Birmingham Navigation*, [1924] 1 K. B., at p. 357; 93 L. J. K. B. 261.

access of light to the dominant tenement. It is a right additional to the ordinary rights of ownership and can be acquired only by express or implied grant or reservation or by prescription.

The only natural rights and easements that will be discussed are those in respect of (1) water; (2) support for land and buildings; (3) light and air; (4) rights of way. Any wrongful interference with the enjoyment of these constitutes a tort analogous to a nuisance.

#### SUB-SECTION 1.—*Water*

In the case of a *natural stream* flowing in a defined and known channel, whether subterranean or on the surface, every riparian proprietor has *jure naturæ*, as incident to his property in the land through which it flows, a right, not to the flow of all the water in its natural state, but only "to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side" (o).

It is to be observed that, to give this right, the channel must, in the case of a subterranean stream, be both *defined* and *known*. The term "known" implies a knowledge gained by reasonable inference from observed facts in the natural or pre-existing condition of the ground, as, e.g., where a stream sinks underground and subsequently emerges (p).

Thus, in *Bleachers' Association, Ltd. v. Chapel-en-le-Frith Rural Council* (q), the plaintiffs were owners of works on the banks of a brook, which was fed by a number of small streams, one of which was in turn fed by a spring. The plaintiffs claimed an injunction to restrain the defendants from interfering with the water in the spring so as to diminish the supply of water in the brook. The only evidence that the water which came to the spring flowed in a defined channel resulted from excavations made by the plaintiffs after the commencement of the action. *Held* (*inter alia*), that evidence derived merely from subsequent excavation gave the plaintiffs no cause of action.

This right of a riparian proprietor, though limited in extent, is absolute in its nature, and for any infringement an action will lie without proof of pecuniary damage (r). Whether it has been

(o) *Embrey v. Owen*, 6 Ex. 353, 368; 20 L. J. Ex. 212; 86 R. R. 331. See also *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J. Ex. 241; *Broadbent v. Ramsbotham*, 11 Ex. 602; 25 L. J. Ex. 115; 105 R. R. 673.

(p) See *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655; 71 L. J. Ch. 859. (q) [1933] 1 Ch. 536.

(r) *Embrey v. Owen* (*ubi supra*); *Sampson v. Hoddinott*, 1 ('. B. (N.S.), at p. 611; 26 L. J. C. P. 148; *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B., at p. 811; 64 L. J. Q. B. 207; *Stollmeyer v. Trinidad, etc., Petroleum Co.*, [1918] A. C., at p. 497; 87 L. J. P. C. 77. And for the violation of this right an injunction is a proper remedy: [1918] A. C., at p. 497.

infringed is entirely a question of degree; "all that the law requires of the party by or over whose land a stream passes is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream" (s). "Every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further than this, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him" (t). Subject to this, he may make a reasonable use of the water for manufacturing purposes (u) or may dam up a stream for the purpose of a mill or divert the water for the purpose of irrigation (v). If, however, a riparian proprietor takes water for extraordinary or secondary purposes, he is bound to return it to the stream "practically undiminished in volume and with its natural qualities unimpaired" (w).

But a riparian proprietor has no right to use water for purposes unconnected with his riparian tenement; thus a railway company which owns a few yards of land on each side of a stream has no right to take water for the use of its engines on all parts of its line (x).

And a riparian proprietor has no right to pollute the water flowing by or through his land, and for such pollution an action lies without proof of any actual damage, as the pollution is in itself an *injuria* (y). Moreover, even though the water is already polluted, any further pollution is a wrong (z).

In addition to his natural rights a riparian owner may acquire

(s) *Etibrey v. Owen*, 6 Ex., at pp. 370, 372; 20 L. J. Ex. 212.

(t) *Miner v. Gilmour*, 12 Moo. P. C. 131, at p. 156; 124 R. R. 8.

(u) *Swindon Waterworks Co. v. Wilts, etc., Canal Navigation Co.*, L. R. 7 H. L., at p. 704; 45 L. J. Ch. 638.

(v) *Miner v. Gilmour*, 12 Moo. P. C., at p. 156; 124 R. R. 8; *John White & Sons v. J. & M. White*, [1906] A. C., at p. 80; 76 L. J. P. C. 14.

(w) *Young & Co. v. Banket Distillery Co.*, [1893] A. C., at p. 696.

(x) *McCarthy v. Londonderry, etc., Ry.*, [1904] A. C. 301; 73 L. J. P. C. 73.

(y) *Wood v. Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Hodgkinson v. Eddowes*, 1 B. & S. 229; 32 L. J. Q. B. 231; 129 R. R. 728; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; 46 L. J. Ch. 778; *Jones v. Llanrwst Urban District Council*, [1911] 1 Ch. 693.

(z) *Wood v. Waud* (*ubi supra*), and see *Att.-Gen. v. Leeds Corporation*, L. R. 5 Ch. 583; 39 L. J. Ch. 711.

further rights by prescription or by reservation or grant, including even a right to pollute a stream (a). But where a prescriptive right to pollute a stream is claimed the extent of the right must be measured by the amount of certain and uniform user, and any progressive increase in the amount of pollution prevents the establishment of a prescriptive right to pollute (b). And no prescriptive easement can be claimed to commit an act contrary to the provisions of the Rivers Pollution Act, 1874, because a lost grant cannot be presumed where such a grant would have been in contravention of a statute (c).

The right to the unpolluted and uninterrupted flow of water in an *artificial* watercourse can be acquired only by a grant or by reservation or by prescription, but, when so acquired, it is of the same nature as the right in respect of a natural stream (d). In considering whether any right has been acquired, the matters to be taken into account are "first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been in fact used and enjoyed" (e).

The term "temporary" is not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it is not meant to be a permanent alteration of the face of nature but a temporary alteration for the purpose of carrying on a particular business or effecting a particular object (f). So in *Arkwright v. Gell* (g) it was held that the mere fact that water pumped from mines had flowed over a man's land for more than sixty years gave him no right to the continuance of the flow.

As to the circumstances in which the artificial stream was created an important point for consideration is whether the stream was originally made entirely over the land of the person constructing it or whether it was also constructed over the lands of other persons (h). In the first class of cases no presumption arises that

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(a) See *Wood v. Waud* (*ubi supra*); *Sampson v. Hoddinott* (*ubi supra*).

(b) *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch., at p. 281; 91 L. J. Ch. 207, and see *Crossley & Sons, Ltd. v. Lightowler*, L. R. 2 Ch., at p. 481; 86 L. J. Ch. 584.

(c) *Hulley v. Silversprings, etc., Bleaching Co.* (*ubi supra*).

(d) *Basly & Co. v. Clark, Son & Morland*, [1902] 1 Ch. 649; 71 L. J. Ch. 396 (reviewing the earlier authorities).

(e) [1902] 1 Ch., at p. 668.

(f) *Burrows v. Lang*, [1901] 2 Ch. 502; 70 L. J. Ch. 607; *Bartlett v. Tottenham*, [1932] 1 Ch. 114; 101 L. J. Ch. 160.

(g) 5 M. & W. 208; 8 L. J. Ex. 201.

(h) See cases cited in note (f), *supra*.

it was constructed for the benefit of anyone but the owner of the land on which it was made (i), and he may acquire an easement to discharge the water upon the land of another person without enabling that other person to acquire a right to its flow (k). In the second class of cases the Court may infer that the stream was constructed for the benefit of all the persons through whose land it runs and that its flow was intended to be enjoyed by all of them as of right (l). And where such enjoyment has lasted for a long time that inference ought to be drawn.

Thus, in *Whatmore's, Ltd. v. Stanford* (m), an artificial stream after crossing the lands of several other persons ran through the land of A, a tanner, and B, a miller. A and his predecessors had openly and continuously used the water of the stream for his tannery for over 200 years and it had probably been used by the mill for the same time. *Held*, that the proper inference was that the stream had been constructed for the joint benefit of the tanner and miller and that the former was entitled to use it for all purposes not causing any sensible or material injury to the latter.

A landowner has no rights in respect of water which percolates underground to his land in no defined and known channel (n), or to common surface-water rising out of springy or boggy ground and flowing in no definite channel (o); if, therefore, the person who owns the land through which the water percolates or from which it rises intercepts it or drains it off, "this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action" (p).

Thus, in *Bradford Corporation v. Pickles* (q), it was held that no action lay against the defendant for abstracting water which percolated through his land so as to prevent it from reaching springs from which the appellants had hitherto obtained a valuable supply of water, even though he did so with no intention of improving his own land, but with intent to injure the plaintiffs or to compel them to buy him out.

And percolating water may be abstracted even though the result is to lower the level of the subsoil water underneath and at

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(i) *Burrows v. Lang*, [1901] 2 Ch., at p. 508.

(k) *Bartlett v. Tottenham*, [1901] 2 Ch., at p. 129.

(l) *Burrows v. Lang* (*ubi supra*); *Lewis v. Meredith*, [1918] 1 Ch. 571; 82 Ll. J. Ch. 255.

(m) [1909] 1 Ch. 427; 78 Ll. J. Ch. 144.

(n) *Chasevmore v. Richards*, 7 H. L. C. 349; 29 Ll. J. Ex. 81.

(o) *Raustron v. Taylor*, 11 Ex. 369; 25 Ll. J. Ex. 83; 105 R. R. 567. See also *McNab v. Robertson*, [1897] A. C. 129; 66 Ll. J. P. C. 27.

(p) *Acton v. Blundell*, 12 M. & W., at p. 354; 18 Ll. J. Ex. 269; 67 R. R. 361.

(q) [1893] A. C. 587; 64 Ll. J. Ch. 757.

the sides of a stream and so to diminish the quantity of water in the stream (r). But underground water cannot be drained away so as to draw off water which has actually reached a defined surface channel (s).

And though a person may intercept or draw off percolating water he may not pollute it so as to create a nuisance (t).

### SUB-SECTION 2.—*Support*

For land *unweighted by buildings* the owner has *jure naturæ* a right both to the lateral (u) and vertical (x) support of his neighbour's land. The right is not a right to have his neighbour's land remain in its natural state, but "a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support" (y). Proof of actual pecuniary loss is not, however, necessary (z).

In *Darley Main Colliery Co. v. Mitchell* (a), which was a case of vertical support, the following rules were laid down:—

1. That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

2. That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right

(r) *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; 75 L. J. K. B. 361. It has also been held that where a man puts down a shaft in his own land for the purpose of pumping brine, his act is not unlawful merely because the brine so obtained may be the result of a dissolution of rock in his neighbour's property: *Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822; 76 L. J. K. B. 55.

(s) *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483, as explained in *Jordeson v. Sutton, etc., Gas Co.*, [1899] 2 Ch., at p. 251; 68 L. J. Ch. 457, and *English v. Metropolitan Water Board* (*ubi supra*).

(t) *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454; *ante*, p. 344.

(u) *Wyatt v. Harrison*, 8 B. & Ad. 871; 1 L. J. K. B. 237; 37 R. R. 566; *Gayford v. Nicholls*, 9 Ex. 702; 28 L. J. Ex. 205; 96 R. R. 925.

(x) *Humphries v. Brogden*, 12 Q. B. 789; 20 L. J. Q. B. 10; 76 R. R. 402. "In all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled as of common right to support for his property in its natural position and in its natural condition without interference or disturbance by, or in consequence of, mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication": *Butterknowle Colliery Co. v. Bishop Auckland, etc., Co.*, [1906] A. C., at p. 313; 75 L. J. Ch. 541.

(y) *Dalton v. Angus*, 6 A. C., at p. 808; 50 L. J. Q. B. 689.

(z) *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B., at pp. 311-313; 64 L. J. Q. B. 207.

(a) 11 A. C., at p. 147; 55 L. J. Q. B. 529. With regard, however, to mines the Common Law rules have been modified by the Mines (Working Facilities, etc.) Act, 1923.

so as not to disturb the lawful enjoyment of the owner of the surface.

3. That the excavation and removal of the minerals does not, *per se*, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface.

4. But that, when in consequence of not leaving or providing sufficient supports a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface and constitutes his cause of action.

Each subsidence is therefore a fresh cause of action, and the Statute of Limitations runs from the date of the subsidence, not the date of the excavation (b). And, since the subsidence is the cause of action, damages cannot be claimed in respect of the risk of future subsidence (c).

No duty to prevent subsidence rests on a person who has not taken any part in the excavation, and therefore the owner of minerals is not liable for a subsidence occasioned by the acts of his predecessor but occurring after he came into possession (d).

In respect of *buildings* the right to support is an easement which can be acquired only by prescription or by reservation or grant, though, when gained, it is the same in nature and extent as the natural right to the support of land (e).

The right to such support is acquired by twenty years' enjoyment without interruption if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building (f).

The right of support to buildings can be gained not only from land but also from adjoining buildings (g). And where land is granted for the purpose of enabling a house to be built upon it a grant of the right of support will also be implied (h).

And, though there is no natural right of support for buildings, but only for land, yet "on proof that the weight of a newly

(b) *Id.*

(c) *West Leigh Colliery Co. v. Tunnickliffe & Hampson, Ltd.*, [1908] A. C. 27; 77 L. J. Ch. 102.

(d) *Hall v. Duke of Norfolk*, [1900] 2 Ch. 193; 69 L. J. Ch. 571.

(e) *Dalton v. Angus* (*ubi supra*).

(f) *Id.* See also *Birmingham Corporation v. Allen*, 6 Ch. D., at p. 292; 46 L. J. Ch. 673.

(g) *Lemaître v. Davis*, 19 Ch. D. 281; 51 L. J. Ch. 173; 46 L. T. 407. In such a case the owner of the servient tenement is not under any obligation to repair it so as to maintain the support. *Sack v. Jones*, [1925] 1 Ch. 235; 94 L. J. Ch. 229.

(h) *Rigby v. Bennett*, 21 Ch. D. 559.

erected house has not contributed to the subsidence, its value may be recovered by way of damage consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land" (i).

Since a landowner has no rights over percolating underground water, he has no right of support from such water; he has, therefore, no right of action if his land subsides because the subjacent water is drawn away by drainage operations upon his neighbour's land (k). But this rule applies only to water, and not where the plaintiff is deprived of support through operations upon adjoining land which withdraw from his land subterranean silt (l) or pitch (m).

### SUB-SECTION 3.—*Light and air*

**Light.**—The right to the access of light to the windows of a house over another person's land is an easement which can be acquired only by reservation or grant or by prescription. In this respect it differs from the right to freedom from smell and noise, which is a right *ab initio* incident to the right of property. But the nature of the right is in each case the same, and a plaintiff has not in either case a right of action unless there has been some substantial interference with his comfortable use and enjoyment of his house. A person cannot by prescription acquire a right to all the light that comes through his windows, and, if the light is obstructed, he has a right of action only when so much has been taken as to cause a nuisance. The test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house? (n). The right of the plaintiff is not, however, to be tested

(i) *Att.-Gen. v. Conduit Colliery Co.*, [1805] 1 Q. B., at p. 312; 64 L. J. Q. B. 207; 71 L. T. 777, citing *Brown v. Robins*, 4 H. & N. 186; 28 L. J. Ex. 250; 118 R. R. 382; *Hamer v. Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102; 123 R. R. 622.

(k) *Popplewell v. Hodkinson*, L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(l) *Jordeson v. Sutton, etc., Gas Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457.

(m) *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594; 68 L. J. P. C. 114.

(n) The above paragraph is a summary of the judgment in *Higgins v. Belts*, [1905] 2 Ch. 210; 74 L. J. Ch. 621; 92 L. T. 850; 21 T. L. R. 552, explaining the leading case of *Colls v. Home & Colonial Stores, Ltd.*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 20 T. L. R. 205, by which the rule as above stated was settled by the House of Lords. See also *Kine v. Jolly*, [1907] A. C. 1; 76 L. J. Ch. 1; *Litchfield-Speer v. Queen Anne's Gate Syndicate*, [1919] 1 Ch., at p. 411; *Semon & Co. v. Bradford Corporation*, [1922] 2 Ch. 737; 91 L. J. Ch. 602.



by reference to the general standard of light in the district, but is a right to have adequate light according to ordinary standards (o); nor is his right limited by the use to which his premises have been put in the past (p).

A right to light can be acquired under the Prescription Act, 1832, only in respect of windows or apertures in the nature of windows, and not to an aperture in the nature of a doorway (q).

**Air.**—The right to the access of *air* can also be acquired only by reservation or grant or by prescription (r). But it can be acquired only in respect of the access of air through some defined channel or aperture (s).

#### SUB-SECTION 4.—*Private rights of way*

A private right of way may be either general or limited in some particular manner, as, *e.g.*, in respect of the traffic by which, or the purposes for which, or the times at which, it may be used.

It may exist either by express or implied grant or reservation (t), or by prescription.

Where it exists by implied grant or reservation its existence depends upon the construction of the instrument creating it, and that construction, subject to the rule that a grant must be construed most strongly against the grantor, depends upon the circumstances surrounding the execution of the instrument (u).

Where it exists by implied grant or reservation its existence and extent depend in general upon the presumed intention of the parties with reference to the manner or purposes in and for which land granted or retained by the grantor is to be used (w).

But an implication of the grant or reservation of a *way of necessity* always arises where there is no means of access to the land granted or retained except through land retained or

(o) *Horton's Estate, Ltd. v. James Beattie, Ltd.*, [1927] 1 Ch. 75; 96 L. J. K. B. 15.

(p) *Price v. Hilditch*, [1930] 1 Ch. 500; 99 L. J. Ch. 299.

(q) *Levet v. Gas Light, etc., Co.*, [1919] 1 Ch. 24; 88 L. J. Ch. 12; 119 L. T. 761.

(r) *Cable v. Bryant*, [1908] 1 Ch. 259; 77 L. J. Ch. 78.

(s) *Webb v. Bird*, 13 C. B. (N.S.) 841; 81 L. J. C. P. 385; 184 R. R. 756; *Bryant v. Lefever*, 4 C. P. D. 172; 48 L. J. C. P. 380; *Bass v. Gregory*, 26 Q. B. D. 461; 59 L. J. Q. B. 574.

(t) See, *e.g.*, *Thomas v. Owen*, 20 Q. B. D. 225; 57 L. J. Q. B. 198; 58 L. T. 162; *Hansford v. Jago*, [1921] 1 Ch. 322; 90 L. J. Ch. 129; *Aldridge v. Wright*, [1920] 2 K. B. 117; 98 L. J. K. B. 582.

(u) *Williams v. James*, L. R. 2 C. P. 577; 86 L. J. C. P. 256; *Cannon v. Villars*, 8 Ch. D. 415; 47 L. J. Ch. 597.

(w) *Hansford v. Jago*, [1921] 1 Ch., at p. 333.

granted by the grantor (*y*). This right, however, exists only for the purpose of enabling the owner of the dominant tenement to enjoy it in the condition in which it was at the time of the grant or reservation (*z*), or in the manner in which it was intended by the parties to be used (*a*), and ceases if at any subsequent time the owner of the dominant tenement acquires a method of reaching it without passing over the servient tenement (*b*).

Where a right of way has been acquired by prescription, its nature and extent are limited by the way in which it was used during its acquisition (*c*).

Every right of way must be capable of identification and must therefore have a *terminus a quo* and a *terminus ad quem*, but it is not essential that there should be a beaten track between its *termini*, and the precise line which a person must follow in exercising a right of way need not always be the same (*d*).

A right of way must be connected with the enjoyment of the dominant tenement (*e*) and may be used only for the purposes of that tenement (*f*). And, subject in the case of a right created by express grant to the terms of the grant, the mode of enjoyment of the dominant tenement and the purposes for which it is used cannot be altered in such a way as to impose any additional burden on the servient tenement (*g*). But a right of way expressly granted for general purposes is not restricted to access to the land for the purposes which were required at the date of the grant (*h*).

An action in the nature of an action of nuisance lies for any obstruction of a right of way which constitutes a substantial interference with the reasonable enjoyment of the right (*i*).

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(*y*) *Holmes v. Goring*, 2 Bing. 76; 2 L. J. (o.s.) C. P. 184; *Pinnington v. Galland*, 9 Ex. 1; 22 L. J. Ex. 848; 22 L. T. (o.s.) 41; *Gayford v. Moffatt*, L. R. 4 Ch. 133; *London Corporation v. Riggs*, 13 Ch. D. 798; 49 L. J. Ch. 297.

(*z*) *London Corporation v. Riggs* (*ubi supra*).

(*a*) *Serff v. Acton Local Board*, 81 Ch. D. 679; 55 L. J. Ch. 569.

(*b*) *Holmes v. Goring* (*ubi supra*); *Pearson v. Spencer*, 3 B. & S., at p. 767.

(*c*) *Williams v. James* (*ubi supra*); *United Land Co. v. Great Eastern Ry.*, L. R. 10 Ch. 586; 44 L. J. Ch. 686; 33 L. T. 292.

(*d*) *Harrison v. Jago*, [1921] 1 Ch., at p. 340; and see *Wimbledon, etc., Conservators v. Dixon*, 1 Ch. D. 362; 45 L. J. Ch. 353.

(*e*) *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. Q. B. 315; 84 R. R. 507; *Boiley v. Stephens*, 12 C. B. (n.s.), at p. 115; 31 L. J. C. P. 226.

(*f*) *Skull v. Glenister*, 16 C. B. (n.s.) 81; 39 L. J. C. P. 185; 9 L. T. 768.

(*g*) *Williams v. James* (*ubi supra*); *Wimbledon, etc., Conservators v. Dixon* (*ubi supra*); *Harris v. Flower*, 74 L. J. Ch. 127; 91 L. T. 816.

(*h*) *White v. Grand Hotel, Eastbourne, Ltd.*, [1913] 1 Ch. 118; and see *Finch v. Great Western Ry.*, 5 Ex. D. 254; and *Sketchley v. Berger*, 69 L. T. 754.

(*i*) *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Sketchley v. Berger* (*ubi supra*); *Petty v. Parsons*, [1914] 2 Ch. 653; 84 L. J. Ch. 81. As to the abatement of an obstruction, see *Lane v. Capsey*, [1891] 8 Ch. 411.

## CHAPTER IV

## NEGLECT

THE subject-matter of the two previous chapters has consisted mainly of wrongs which constitute a violation of absolute rights.

The present chapter is concerned with cases in which both the plaintiff and the defendant have limited or qualified rights and the plaintiff has suffered damage through the negligence of the defendant in circumstances in which he owed a duty to the plaintiff to avoid causing such damage.

Thus, as has already been pointed out, a person using a highway has not an absolute right to be immune from any injury caused to him by other persons using the highway, but he has a right qualified by their equal rights. He is therefore subject to all "necessary and inevitable risks" (a) attendant upon the ordinary user of the highway. But he is entitled to be indemnified against damage caused to him by other users of the highway through their failure to use reasonable care to avoid injury to him. The cases in which an action of negligence lies fall into two main classes, namely—

- (i) those in which the defendant was merely under a duty to take reasonable care;
- (ii) those in which the extent of the duty and the care are specifically defined by rules of law.

The first section of this chapter deals with the general conditions for the maintenance of an action of negligence and with the cases in which the duty of the defendant is merely to take reasonable care. The second section contains some of the most important classes of cases in which the duty of the defendant has been specifically defined.

SECTION 1.—*General conditions for the maintenance of an action of negligence*

A. *What must be proved by the plaintiff.*—When a plaintiff claims damages for injury caused by the defendant's negligence the burden lies upon him of establishing—

- (1) that the defendant was under a duty not to be negligent towards him, *and*
- (2) that that duty was broken, *and*

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(a) *Tillett v. Ward*, 10 Q. B. D., at p. 20; 52 L. J. Q. B. 61.

(8) that the injury or damage of which he complains was wholly or in part a consequence of the defendant's negligence (b).

1. The defendant must have been under a duty to use care to avoid injury to the plaintiff.—“The law takes no cognisance of carelessness in the abstract. It concerns itself only where there is a duty to take care and where failure in that duty has caused damage” (c).

And there must have been a duty to the plaintiff: “the question of liability for negligence cannot arise at all until it is established that the man who was negligent owed some duty to the person who seeks to make him liable for his negligence . . . a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them” (d).

Whether in any particular circumstances there is any duty of taking care and how far it goes are questions of law (e), and the nature and extent of the duty varies in different classes of cases. It may be created either by physical proximity or proximity of relationship, i.e., such a close and direct relationship “that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act” (f).

The foregoing principles are illustrated by the following cases :—

1. *Absence of physical proximity.* In *Bourhill v. Young* (g), a motor cyclist, while driving at an excessive speed, collided with a motor car. The plaintiff, who was standing at a distance of about 45 feet, heard, though she did not see, the collision and suffered a severe nervous shock as a result of which she was for some time prevented from carrying on her business. It was held by the House of Lords that the motor cyclist, although guilty of negligence as regards the owner of the motor car, was not guilty of negligence towards the plaintiff. “The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable cause injury to others, and the duty is owed to those to whom injury may reasonably be anticipated if the duty is not observed” (h). The cyclist could not reasonably anticipate injury to a person who was so far outside the range of the collision.

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(b) See *Glasgow Corporation v. Muir*, [1943] A. C., at p. 460.

(c) *Donoghue v. Stevenson*, [1932] A. C., at p. 618; 101 L. J. P. C. 119.

(d) *Le Lievre v. Gould*, [1893] 1 Q. B., at p. 497; 62 L. J. Q. B. 353.

(e) *Butler v. Fife Coal Co.*, [1912] A. C., at p. 519; 81 L. J. P. C. 9.

(f) *Donoghue v. Stevenson*, [1932] A. C., at p. 581; 101 L. J. P. C. 119.

(g) [1943] A. C. 92.

(h) [1943] A. C., at p. 134.

2. *Absence of proximity of relationship.* In the case of *Le Lievre v. Gould* (i) A from time to time advanced money to B, who was a builder, upon the faith of certificates given by the defendant, a surveyor employed by B, as to the progress of the buildings upon the security of which the money was lent. Through the negligence of the surveyor the certificate contained inaccurate statements as to the progress of the works. It was held that there was no relationship between A and the defendant which could make the latter liable for the results of his negligence.

In the case of *Cavalier v. Pope* (k), a landlord let an unfurnished house in a dilapidated condition but subsequently contracted with the tenant that he would repair it. He failed to do so, and, through the want of repair, the tenant's wife fell through the flooring and was injured. It was held that she had no common law right of action against the landlord for, apart from contract, he was under no duty to repair, and the only duty created by the contract was towards the tenant.

3. *Existence of proximity of relationship.* In *Donoghue v. Stevenson* (l), the appellant claimed damages for injuries which she had suffered by drinking ginger beer manufactured by the respondents and containing a decomposed snail. She alleged—

- (i) that the bottle was purchased for her by a friend from a retailer;
- (ii) that it was made of opaque glass and that she had no reason to suspect that it contained a snail;
- (iii) that when she had drunk some of the ginger beer the snail floated out of the bottle and that, as a result of the sight of it and of the impurities in the beer which she had drunk, she suffered from shock and gastro-enteritis;
- (iv) that the ginger beer was manufactured by the respondents for sale to the public, bottled by them and sealed by a metal cap;
- (v) that it was the duty of the respondents to provide a system of working which would not allow snails to exist in their bottles and to provide an efficient system of inspecting bottles before they were filled, and that they had failed in these duties and had so caused the accident.

It was held that these allegations disclosed a good cause of action, the appellant being in such a proximate relationship to the manufacturers that a duty to take care was imposed upon the latter, this proximate relationship resting on the fact that until the defect had caused the mischief it could not be detected by any examination that was reasonably possible (m).

The actual decision in this case is merely that when a manufacturer sells his products in such a form as to show that he intends them to reach the consumer in the form in which they

(i) [1893] 1 Q. B. 491; 62 L. J. Q. B. 353.

(k) [1906] A. C. 128; 75 L. J. K. B. 609.

(l) [1932] A. C. 592; 101 L. J. P. C. 119.

(m) That is to say, "possible" in a commercial sense, see *Hamilton v. C. A. Dair*, [1941] 2 K. B., at p. 376.

left him, with no reasonable possibility that any intermediate examination will be made, he owes a duty to the consumer to take reasonable care in their preparation so as to avoid injury to him. The decision is not based upon the ground that the article in question was "*per se* dangerous or one which was known by the defendant to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it" (n).

In *Grant v. Australian Knitting Mills, Ltd.* (o) the same principle was applied where the appellant contracted dermatitis through wearing woollen pants manufactured by the respondents and bought from a retailer, the cause of his injury being a latent defect which could not be detected by any examination that could reasonably be contemplated and the appellant having used the pants as they were intended to be used and exactly as they left the respondents.

In later cases the same principle has been applied to repairers of goods.

Thus, in *Malfoot v. Nozal* (p), the defendant fitted a side-car to a motor cycle owned by A. While A was driving the combination along a road the side-car became detached and A and his passenger were injured. It was held that, as the side-car was to be used without any new test the defendant was guilty of negligence and was liable to the passenger in tort.

Again, in *Herschthal v. Stewart & Ardern* (q), the defendants supplied to a company for the immediate use of the plaintiff, who was one of its directors, a motor car which they had re-conditioned. It was delivered in the afternoon or evening and used by the plaintiff early the next day. Owing to its faulty condition a wheel came off after it had been driven a few miles and the plaintiff in consequence suffered injuries. It was held that the defendants were liable because they had supplied the car of the plaintiff in circumstances in which they did not anticipate that there would be, before it was used, any such examination as would be likely to reveal a defect such as existed in the car.

Again, in *Haseldine v. Daw & Sons, Ltd.* (r), it was held that an engineering firm which, under contract with the landlord of a block of flats, undertook to keep in repair a lift used by the tenants of the flats was liable to a person visiting a tenant of one of the flats for injury caused to him by their negligent failure to keep the lift in proper repair, there being no "possibility or

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(n) [1932] A. C., at p. 602. See also *Travers v. Gloucester Corporation*, [1947] 1 K. B. 78; 116 L. J. K. B. 117, where the defendants were held not to be liable in respect of the death of the mother and dependant of their tenant and living with him, who died from inhaling fumes from a geyser which was installed by them in a defective and dangerous manner.

(o) [1936] A. C. 85; 105 L. J. P. C. 6.

(p) 51 T. L. R. 551.

(q) [1940] 1 K. B. 155; 109 L. J. K. B. 328.

(r) [1941] 2 K. B. 843; 111 L. J. K. B. 45. Compare *Buckner v. Ashby & Horner, Ltd.*, [1941] 1 K. B. 321; 110 L. J. K. B. 480, where contractors were held not liable to third persons after their work had been inspected and passed by their employers.

probability or contemplation that, after repair, the lift would be inspected by the landlord before being put in use" (r).

But the principle of these cases applies only where the defect is hidden and unknown to the consumer or user (s). So where crane manufacturers sold to builders a crane which had defects that were discoverable on reasonable inspection and were in fact discovered by a crane erector employed by the builders, it was held that the manufacturers were not liable under the Fatal Accidents Act for an accident caused to the crane erector who began working the crane before the defects were remedied (t).

Nor does the principle apply to the vendor of a house even though the danger or defect which caused the injury is due to his own faulty construction or one without his knowledge (u). Nor, as will be seen later, does it apply to the letting of land or houses.

Apart from the special kinds of liability which will be considered in the next two sections, the chief classes of cases in which liability for negligence may arise are—

(i) Cases in which there is a place or subject-matter in respect of which both the plaintiff and the defendant are exercising legal rights and neither right is, as such, subordinated to the other (x), so that a duty rests upon each not to infringe the equal rights of the other. Thus where both parties are upon a highway, where each of them has a right to be it is the duty of each to use reasonable care to avoid injury to the person or property of the other (y).

(ii) Cases in which a person is executing some work or operation from which injurious consequences may arise to others unless precautions are taken to avoid them, as, e.g., "where a man does work on or near another's property which involves danger to that property unless proper care is taken" (a) or where a person is carrying on near a highway any operations

(s) [1936] A. C., at p. 105.

(t) *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; 101 L. J. K. B. 768.

(u) *Bottomley v. Bannister*, [1932] 1 K. B. 458; 101 L. J. K. B. 46; *Otto v. Bolton & Norris*, [1936] 2 K. B. 46. But upon a contract to purchase from a builder or the owners of a building estate a house, to be erected or in course of erection, there is an implied warranty (raising a contractual obligation) that it shall be built with proper materials and in a proper manner: *Miller v. Canon Hill Estates, Ltd.*, [1931] 2 K. B. 118; 144 L. T. 567.

(r) See *Dublin, etc., Ry. v. Slattery*, 3 A. C., at p. 1206; *Glasgow Corporation v. Taylor*, [1922] 1 A. C., at p. 64; 91 L. J. P. C. 449.

(y) *Tillett v. Ward*, 10 Q. B. D., at p. 20; 52 L. J. Q. B. 61; *Le Lievre v. Gould*, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353.

(a) *Honeywell & Stein, Ltd. v. Larkin Brothers, Ltd.*, [1934] 1 K. B., at p. 199; 103 L. J. K. B. 71.

involving danger to persons using the highway (b) or is doing work or handling articles which may cause damage either to bystanders or to adjoining property by reason of explosion, fire or other injury (c).

(iii) Cases in which a person is in occupation and control of property which unless kept in a safe condition is likely to cause injury to adjoining occupiers (d).

(iv) Cases in which the defendant was a bailee or employed to perform services for another. Such persons are under a duty to use not only reasonable care, but reasonable skill. An unpaid bailee or person who performs services gratuitously is liable only for failure to use reasonable care and such skill as he is possessed of (e).

Thus, in *Wilson v. Brett* (f), it was held that the defendant, who gratuitously rode a horse for the plaintiff, was bound, being skilled in horses, "to use such skill in the management of the horse as he possessed".

But a person who holds himself out for employment for reward in any capacity is liable unless he possesses and exercises reasonable skill. "From the former is reasonably expected such care and diligence as persons ordinarily exercise in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment" (g). Thus "every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill" (h).

(v) Another class of cases consists of those in which the defendant is performing a public or statutory duty. Thus public

(b) *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016.

(c) *Brooke v. Bool*, [1928] 2 K. B. 578; 97 L. J. K. B. 511 (negligently causing an explosion of gas which injured adjoining property); *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281; 90 L. J. K. B. 280 (negligence in the course of filling tins with motor spirit); *Ercelsthor Wire Rope Co. v. Callan*, [1930] A. C. 404; 99 L. J. K. B. 280 (negligence by contractors, who were licensees of land, in the use of machinery likely to cause injury to children who, to their knowledge, were in the habit of playing on the land; see also *Buckland v. Guildford Gas Light & Coke Co.*, [1949] 1 K. B. 410).

(d) *Cunard v. Antifire, Ltd.*, [1933] 1 K. B. 551 (dangerous guttering).

(e) *Shiells & Thorne v. Blackburne*, 1 H. Bl. 158.

(f) *Wilson v. Brett*, 11 M. & W. 113; 12 L. J. Ex. 264. See also *Banbury v. Bank of Montreal*, [1918] A. C., at p. 657; 87 L. J. K. B. 1158.

(g) *Beal v. South Devon Ry.*, 8 H. & C., at p. 842; 140 R. R. 178; 11 L. T. 184.

(h) *Lamphier v. Phipos*, 8 C. & P., at p. 470.



officers are liable for their own negligence in the performance of their duties, and, except in the case of servants of the Crown (i), for the negligence of their subordinates. If, for example, by the negligence of a sheriff or his officers execution is not levied upon the goods of a judgment debtor when it might and ought to have been done, so that damage is caused to the execution creditor (k); or if, after levy, the goods are negligently sold at an under-value (l), the sheriff is liable to an action at the suit of the execution creditor (m). So also a medical man who undertakes the statutory duty of giving a certificate that a person is of unsound mind must use reasonable care, and, if he fails to do so, he is liable for any damage thereby caused to the person in respect of whom the certificate is given (n). So also when a statutory obligation is imposed upon a person for the protection of a particular class, *e.g.*, workers in a mine or factory, then a member of that class injured by the non-performance of the obligation is entitled to sue the person upon whom it is imposed in an ordinary action founded on personal negligence (o).

2. The defendant must have been negligent.—“Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use” (p). It does not refer to the defendant’s state of mind but to his conduct, so that a man may

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(i) *Ante*, p. 261.

(k) *Hobson v. Thelluson*, L. R. 2 Q. B. 642; 36 L. J. Q. B. 302. Some pecuniary damage must be shown: *prima facie* the measure of damage is the value of the goods which might have been and were not seized; but it is for the jury to say whether or not, in the circumstances of any particular case, the plaintiff would have derived any benefit from the execution.

(l) *Mullet v. Challis*, 16 Q. B. 239; 20 L. J. Q. B. 161; *Wright v. Child*, L. R. 1 Ex. 358; 35 L. J. Ex. 209.

(m) It is the sheriff’s business to find out what goods to seize, and, if he seizes the goods of the wrong person, such person will have a remedy against the sheriff. It is no part of the ordinary duty of a solicitor to direct the sheriff to seize particular goods, but, if he does so, and goods of a person other than the judgment debtor are seized, he, as well as the sheriff, is liable for the trespass. But as he has no implied authority from his client to give such directions, the client is not liable unless the solicitor has express authority or his act has been ratified by his client: *Smith v. Keal*, 9 Q. B. D. 840; 51 L. J. Q. B. 287; *Morris v. Salberg*, 22 Q. B. D. 614; 58 L. J. Q. B. 275.

(n) *Harnett v. Fisher*, [1927] 1 A. C. 578; 96 L. J. K. B. 856; and see *Everett v. Griffiths*, [1921] 1 A. C. 631; 90 L. J. K. B. 737. But by s. 16 of the Mental Treatment Act, 1930, no proceedings can be brought against him without the leave of the High Court.

(o) *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A. C., at p. 18; 102 L. J. P. C. 123. The defence of contributory negligence may therefore be set up: *Carell v. Powell Duffryn Collieries, Ltd.*, [1940] A. C. 152; 108 L. J. K. B. 779.

(p) *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P., at p. 612.

be negligent although he acts to the best of *his own* judgment (q). It consists in conduct lacking in reasonable care, in doing or omitting to do (r) something which, in all the circumstances of the case, would not have been done or omitted by a prudent and reasonable man (s). "The degree of want of care which constitutes negligence must vary with the circumstances. . . . It is not a matter of uniform standard. It may vary, according to the circumstances, from man to man, from place to place, from time to time. And epithets like 'wilful' or 'gross' do not advance the inquiry and can well be avoided" (t).

*Evidence of negligence.*—Whether or not there has been a failure to take proper care is a question of fact (u). But before any question of negligence can be left to the jury, there is a preliminary question, which is one of *law* for the Judge—namely, "whether any facts have been established by evidence from which negligence *may be* reasonably inferred" (w). If there is no evidence of negligence it is the duty of the Judge to withdraw the case from the jury (y). And the same rule applies if there is no evidence connecting the negligence with the damage suffered by

(q) *Vaughan v. Menlove*, 3 Bing. N. C. 468; 6 L. J. C. P. 92. In *civil* proceedings no question therefore arises as to the existence of *mens rea*.

(r) With regard, however, to a person who undertakes a voluntary act, though he is liable if he performs it improperly, he is not liable if he neglects altogether to perform it: *Skelton v. London and North Western Ry.*, L. R. 2 C. P., at p. 686; 35 L. J. C. P. 249.

(s) *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J. Ex. 212; *Ruck v. Williams*, 3 H. & N. 208; 27 L. J. Ex. 357; 117 R. R. 697; *Vaughan v. Taff Vale Ry.*, 5 H. & N. 679; 29 L. J. Ex. 247; 2 L. T. 394; 120 R. R. 779.

(t) *Caswell v. Powell Duffryn Collieries*, [1940] A. C., at pp. 176-177. The expression "gross negligence", which is used in some cases, has never been a term of definition, indicating a *degree* of negligence greater than the lack of ordinary care and skill. It has, however, been loosely employed as *descriptive* of the kind of negligence for which persons rendering gratuitous services were liable as distinct from persons who were paid for their services, that is to say, the lack of ordinary care and skill, as distinct from the care of a skilled workman: *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P., at p. 617. But there is no rule of law that a person who renders gratuitous services is liable only for gross negligence in the sense of some negligence which is more "gross" than the failure to use ordinary care and skill: to render him liable it is sufficient that the jury have found against him a want of ordinary and reasonable care or skill: *Karavias v. Callinicos*, [1917] W. N. 823. This point was decided as early as 1843, in the case of *Wilson v. Brett* (*ante*, p. 365), where Rolfe, B., in considering what was negligence in the case of a person rendering gratuitous services, said that he "could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet".

(u) *Butler v. Fife Coal*, [1912] A. C., at p. 159; 81 L. J. P. C. 99. See also *Tidy v. Battman*, [1934] 1 K. B. 819; 103 L. J. K. B. 158.

(w) *Metropolitan Ry. v. Jackson*, 3 A. C., at p. 197; 47 L. J. P. C. 303.

(y) *Dublin, etc., Ry. v. Slattery*, 3 A. C., at p. 1175; 39 L. T. 365.

the plaintiff (z). But if the plaintiff has adduced such evidence as, if uncontradicted, would justify a verdict in his favour, no amount of contradictory evidence will justify the withdrawal of the case from the jury (a).

The mere occurrence of an accident is not in itself evidence of negligence, except when the principle of *res ipsa loquitur* is applicable—that is to say, when the accident is by its nature more consistent with its being caused by negligence for which the defendant is responsible than by other causes, so that the mere occurrence of the accident is *prima facie* evidence of negligence (b). Thus the mere fact that a motor vehicle skids (c), or that a horse runs away (d), or that the door of a railway carriage comes open during a journey (e), is no evidence of negligence on the part of the person driving it, because either of such facts may happen from many causes without any negligence.

But “where the [cause of the accident] is under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care” (f). Thus, the fall of a sack from a crane (g) and the fall of a barrel from a window of a shop into the highway (h) have been held to constitute evidence of negligence as being more consistent with negligence than with care. So also an accident to, or caused by, a vehicle may be *prima facie* evidence of negligence where the accident itself is evidence of a defect in the vehicle (i) or of improper driving (j): thus the fact that a motor car mounts the pavement (k) or that some portion of it sweeps across the pavement (l) is *prima facie*

(z) *Ibid.*

(a) *Id.*, at p. 1168.

(b) *Cole v. De Truffford*, [1918] 2 K. B., at p. 528; 87 L. J. K. B. 764.

(c) *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652; 78 L. J. K. B. 1063.

(d) *Hammack v. White*, 11 C. D. (N.S.) 588; 81 L. J. P. C. 129; *Manzoni v. Douglas*, 6 Q. B. D. 115; 50 L. J. Q. B. 289.

(e) *Hayson v. London & N. W. Ry.*, [1914] 1 K. B. 421; 114 L. J. K. B. 449.

(f) *Scott v. London Dock Co.*, 3 H. & C. 596; 34 L. J. Ex. 220.

(g) *Scott v. London Dock Co.* (*ubi supra*).

(h) *Byrne v. Boadle*, 2 H. & C. 722; 38 L. J. Ex. 13.

(i) *Christie v. Gripps*, 2 Camp. 79; *Wing v. London General Omnibus Co.*, [1909] 2 K. B., at p. 662. See also *Newberry v. Bristol Tramways Co., Ltd.*, 107 L. T. 801; 29 T. L. R. 177.

(j) *Hallwell v. Venables*, 99 L. J. K. B. 353; 113 L. T. 215.

(k) *Ellon v. Selfridge*, [1900] W. N. 45; 46 T. L. R. 236.

(l) *Laurie v. Raglan Building Co.*, [1912] 1 K. B. 152. A skid may or may not be due to negligence. Accordingly, if there is *prima facie* evidence of negligence, as when a motor car mounts the pavement, the defendant cannot succeed

evidence of negligence. So also the fact that a motor cyclist runs into an obstruction in front of him may be *prima facie* evidence of negligence, though every case must depend upon its own facts (*m*). And, in the case of a statutory obligation, the fact that the obligation has not been performed is in itself evidence of personal negligence on the part of the person on whom the obligation is imposed (*n*).

But negligence cannot be inferred from the failure to take extraordinary precautions—as, *e.g.*, to guard against a frost of extraordinary severity (*o*).

So, also, negligence cannot be inferred from the mere fact that a person leaves standing in the road a motor car, which will not move unless some person intentionally puts it in motion (*p*). But there is evidence of negligence where a motor car whose brakes are out of order is left unattended on a hill, with merely a block of wood as a brake, so that it can easily be moved (*q*). And there is evidence of negligence if a horse, which may move of its own accord, is left unattended in a street (*r*).

There must, moreover, be evidence of negligence in relation to the occurrence which is in question; mere evidence of general carelessness is neither sufficient nor relevant. Thus negligence on a particular occasion cannot be inferred from the fact that a railway company is “unpunctual and irregular in its service, badly equipped as to its staff . . . notorious, perhaps, for accidents occurring on its line” (*s*). Where, however, “the issue is that the defendant pursues a particular course of conduct which is dangerous . . . it is legitimate to show that his conduct has been a source of danger on other occasions” (*t*).

Thus, in *Hales v. Kerr* (*t*), the defendant kept a barber's shop. The plaintiff brought an action of negligence against him,

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unless the evidence shows that the skid happened without default on his part (*id.*, at p. 154). See also *Barkway v. S. W. Transport Co.*, [1950] A. C. 185.

(*m*) There is no rule of law that a person driving or riding in the dark must be held to be guilty of negligence if he is driving at such a speed that he cannot pull up within the limits of his vision; *Morris v. Luton Corporation*, [1946] K. B. 114; 115 L. J. K. B. 202, overruling dicta to the contrary in *Baker v. Longhurst*, [1942] 1 K. B. 152, and *Tidy v. Battman*, [1934] 1 K. B. 319.

(*n*) *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A. C., at p. 18.

(*o*) *Blyth v. Birmingham Waterworks*, 11 Ex. 781; 25 L. J. Ex. 212.

(*p*) *Ruoff v. Long & Co.*, [1916] 1 K. B. 148; 85 L. J. K. B. 364.

(*q*) *Martin v. Stanborough*, 41 T. L. R. 1; see also *Parker v. Miller*; 42 T. L. R. 408.

(*r*) *Lynch v. Nurdin*, 1 Q. B. 29; 10 L. J. Q. B. 73; 55 B. R. 191; *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75; 93 L. J. K. B. 702. See also *Deen v. Davies*, [1935] 2 K. B. 282; 104 L. J. K. B. 540.

(*s*) *Metropolitan Ry. v. Jackson*, 3 A. C., at p. 197; 47 L. J. P. C. 303.

(*t*) *Hales v. Kerr*, [1908] 2 K. B. 601, at p. 605; 77 L. J. K. B. 870.

alleging that while being shaved he had contracted an infectious disease through the insanitary condition of the defendant's implements. *Held*, that the fact that two other persons had, at about the same time, contracted the same disease was admissible to prove that the defendant was pursuing a dangerous course of conduct.

8. The damage sustained by the plaintiff must be the result of the defendant's negligence.—The burden of proving this lies upon the plaintiff.

A leading case upon this point is that of *Wakelin v. London and South Western Ry. (u)*. Here the dead body of a man was found at night on the defendants' line near a level-crossing, he having been killed, as the defendants admitted, by a train which did not whistle or give any warning of its approach other than that afforded by the headlights. There was no evidence as to how the deceased got on the line. It was held by the House of Lords that, even assuming there was evidence of negligence by the defendants, there was no evidence connecting the negligence with the accident; there was nothing "to show that the train ran over the man rather than that the man ran against the train".

Another leading case on the same point is that of *Metropolitan Ry. v. Jackson (x)*. Here the plaintiff was a passenger upon the defendants' railway. At Gower Street Station three persons forced themselves into his carriage, which was full, so that they had to stand. At the next station some more persons tried to get into the carriage. The plaintiff rose to prevent them, and while he was standing up the train began to move. To steady himself he put his hand upon the edge of the door of the carriage. A porter came up at that moment, pushed away the persons who were trying to enter, and shut the door upon the plaintiff's hand. It was held that, assuming that the overcrowding of the train was evidence of negligence on the part of the defendants, there was no evidence connecting this negligence with the injury to the plaintiff.

It is not, however, necessary that the injury to the plaintiff should be an immediate consequence of the defendant's negligence; it is sufficient if it is connected therewith by a continuous causal sequence (y). But the defendant is not liable for independent acts of third persons, breaking the chain of causation,

(u) 12 A. C. 11; 36 L. J. Q. B. 229

(x) 8 A. C. 193; 47 L. J. C. P. 808. See also *Hambrook v. Stokes (ante, p. 288)*; *Harnett v. Lond (ante, p. 286)*; *Mersey Docks, etc., Board v. Procter, [1923] A. C. 258*; 92 L. J. K. B. 479

(y) See *ante, p. 285*

unless, as in the case of dangerous things, he is under a special duty to guard against such acts (a).

But, however negligent the defendant may have been and even though the negligence of the defendant may have started the series of events leading to an accident and in that sense was its original cause, the plaintiff cannot succeed if his own negligence was the "immediate and proximate" (b) cause of the accident, or if, even without any negligence on his part, he was the real cause of the accident (c).

So, in *Cruden v. Fentham* (d), the defendant was driving a chaise on the wrong side of the road, which was of considerable width. The plaintiff could have passed without difficulty, but "conceiving it to be the right of the road" crossed over and tried to pass between the chaise and the footway, with the result that a collision took place. *Held*, that the plaintiff could not maintain an action against the defendant because he put himself voluntarily in the way of danger and the injury was of his own seeking (d).

The plaintiff may also fail to recover the whole of the damages suffered by him if it was in part the result of his contributory negligence.

**B. What may be proved by the defendant.**

The defendant may—

- (i) deny the allegations of the plaintiff, *e.g.*, that he was negligent or that the plaintiff has suffered damage or that any damage suffered by the plaintiff was the consequence of his negligence;
- (ii) allege that any damage suffered by the plaintiff was caused by his own negligence.
- (iii) allege that the plaintiff was guilty of contributory negligence.

**Contributory negligence.**—Where injury has been caused to the plaintiff by the combined negligence of two other persons, neither of them can set up as a defence that his negligence alone was not the cause of that injury. Thus, if by a collision between two vehicles a person unconnected with either vehicle is injured, the driver of neither vehicle can escape liability by alleging that

(a) See *post*, p. 389.

(b) *Flower v. Adam*, 2 Taunt. 134. See also *Lewis v. Denyc*, [1940] A. C. 921; 109 L. J. K. B. 817.

(c) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C., at pp. 26, 27.

(d) 2 Esp. 685. See also *Butterfield v. Forrester*, 11 East 60, as explained in *Caswell v. Powell Duffryn, etc., Co.*, [1940] A. C., at p. 265.

but for the negligence of the other driver the accident would not have happened (e).

But a defendant may set up that although the injury to the plaintiff was a consequence of his negligence it was also due to contributory negligence on the part of the *plaintiff*.

The defence of contributory negligence must be distinguished from that of *volenti non fit injuria* (f), which asserts that the plaintiff, by voluntarily taking a risk, released the defendant from a duty which would otherwise have existed.

The term "contributory negligence" does not imply that the plaintiff was under any duty to the defendant (g), but merely that his negligence *materially* contributed to occasion the injury of which he complains (h).

The distinction between the defence of contributory negligence and the defence that damage was not caused by the defendant's negligence is explained in the case of *Dublin, etc., Ry. v. Slattery* (i).

"One mode of establishing that an accident was in no degree caused by the negligence of the defendant is by proof that it was wholly and entirely caused by the negligent conduct of the plaintiff himself. But in such a method of reasoning the *negligence* of the defendant's conduct is so little in issue that it is really immaterial, for if the accident was wholly caused by the plaintiff's conduct, to the exclusion of any other cause, it could not in any degree have been caused by the defendant's negligence."

On the other hand, "the issue of *contributory* negligence on the plaintiff's part [is] an issue which does not arise until the defendant's negligence and its relation to the accident have been first established, and which in the absence of that conclusion is immaterial to the case". Negligence and contributory negligence accordingly raise two distinct issues, the proof of the first being upon the plaintiff, the proof of the second being upon the defendant (h).

(e) *The Bermuda*, 13 A. C., at p. 9; 57 L. J. P. 67.

(f) *Ante*, p. 272.

(g) *Ellerman Lines v. Grayson*, [1919] 2 K. B., at p. 585; approved [1920] A. C. 166; 89 L. J. K. B. 924.

(h) *McLean v. Bull* (1932), 147 L. T. 262.

(i) 3 A. C., at pp. 1177-1181.

(k) See also on this point, *Wakelin v. London and South Western Ry.*, 12 A. C., at p. 32; 56 L. J. Q. B. 229.

The doctrine of contributory negligence developed during the first half of the nineteenth century (l).

The defence of contributory negligence was at first stated in various ways. Thus it was said that the plaintiff could not recover—

If the plaintiff's negligence "in any way concurred in producing the injury" (m).

If the accident was "imputable in any degree to any want of care or improper conduct on the part of the plaintiff" (n).

If the plaintiff "so far contributed to the misfortune by his own negligence and want of ordinary and common care and caution that, but for such negligence or want of ordinary and common care and caution, the misfortune would not have happened" (o).

The doctrine finally established was, however, that a plaintiff could not recover if the injury of which he complains was due to the combined negligence of both himself and the defendant (p). In such cases "the rule of Common Law says, as each has occasioned the accident neither shall recover at all in it" (q).

In all cases, however, the negligence of the plaintiff must have *materially* contributed to the occurrence. Hence at an early period in the development of the law of contributory negligence it was established that this defence could not succeed "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff" (r). In such cases the negligence of the plaintiff, although it may be a causal element of the accident, will not prevent him from recovering, because the decision of the case must turn, not simply on causation but on responsibility (s).

(l) The actual expression "contributory negligence" does not occur in *Bullen & Leake's Pleadings* before the third edition, which was published in 1868.

(m) *Pluckwell v. Wilson*, 5 C. & P. 375.

(n) *Raisin v. Mitchell*, 9 C. & P. 613.

(o) *Tuff v. Warman*, 5 C. B. (N.S.), at p. 585; 27 L. J. C. P. 322; affirmed in *Radley v. London and North Western Ry.*, 1 A. C. 754; 46 L. J. Ex. 578.

(p) See *Wakeln v. London and South Western Ry.*, 12 A. C., at p. 45; *British Columbia Electric Co. v. Louch*, [1916] 1 A. C., at p. 728; 85 L. J. P. C. 28.

(q) *Cayzer, Irvine & Co. v. Carron Co.*, 9 A. C., at p. 881; 54 L. J. P. 18. As to collisions between ships see, however, *post*, p. 377.

(r) *Tuff v. Warman*, 5 C. B. (N.S.), at p. 585; *Radley v. London and North Western Ry.*, 1 A. C. 754; 46 L. J. Ex. 578.

(s) *McLean v. Bell* (*ubi supra*). The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which caused the damage. It is in search not merely of a causal agency but of the responsible agent: *British Columbia Electric Co. v. Louch*, [1916] 1 A. C. 719, at p. 727; 85 L. J. P. C. 28.



Thus, in *Davies v. Mann*, the plaintiff hobbled an ass and turned it out to graze on the roadside. The defendant's waggon, driving at a "smartish pace" ran against it and killed it. *Held*, that even if the ass was wrongfully on the highway, the plaintiff was not debarred from recovering, because the defendant by ordinary care could have avoided it (t).

Again, in *Radley v. London and North Western Ry. (u)*, the plaintiffs were colliery owners and had a siding which communicated with the defendants' railway. The defendants used to take full trucks from the siding and return them to the siding when empty. One evening the defendants' servants returned to the siding a set of trucks in the first of which was a broken truck raising the height of the two trucks to 11 feet. In front of this set of trucks there was a bridge over the siding at a height of eight feet. The next day the defendants' servants brought another set of trucks to the siding and pushed the first set forward until the two front trucks reached the bridge. Some resistance being then felt, the power of the engine was increased and the two front trucks then broke down the bridge. The plaintiffs, having brought an action to recover damages for the injury to the bridge, it was alleged by the defendants that the plaintiffs were guilty of contributory negligence in not moving the first set of trucks to a safe place. *Held*, that this defence could not succeed if in the opinion of the jury the accident might have been avoided by reasonable care on the part of the defendants' servants.

This principle usually operates where after the contributory negligence of the plaintiff, the defendant had in fact an opportunity of avoiding its results. But it also applies where the want of ordinary care and diligence on the part of the defendant, though anterior in point of time to the plaintiff's contributory negligence, incapacitated him from exercising an opportunity of avoiding the result of the plaintiff's negligence. Thus, in a collision between two vehicles, if—

- (i) the defendant was negligent, and
- (ii) the plaintiff was guilty of negligence contributing to the collision, but
- (iii) the collision might ultimately have been avoided but for a defect in the brakes of the defendant, due to his negligence,

the defendant is guilty of contributory negligence although he did his best to avoid the consequences of the plaintiff's negligence (a).

In cases of this description it was sometimes suggested that

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(t) 10 M. & W. 546; 12 L. J. Ex. 10. The negligence of the donkey owner was a fault not contributing to the collision, it was merely a *causa sine qua non*: *Boy Andrew v. St. Rognwald*, [1948] A. C., at p. 149.

(u) 1 A. C. 754; 46 L. J. Ex. 75.

(a) *British Columbia Electric Co. v. Loach*, [1916] 1 A. C. 719; 85 L. J. P. C. 23.

the proper test of liability was "who had the last opportunity of avoiding the mischief?" It has, however, been said that this is "inaptly framed and likely to lead to mischief" (b). "If the negligence of both parties continues right up to the moment of collision each party is to blame for the collision and for the damage which is the result of the continued negligence of both (c)".

Where, however, the defendant has by his negligence placed the plaintiff in a dangerous situation, he cannot set up the defence that the plaintiff caused the accident or was guilty of contributory negligence merely because the plaintiff has not adopted the best means of avoiding the danger (d), or, acting under a reasonable apprehension of personal danger, and in a reasonable and prudent way, has adopted a perilous way of escape from the dangerous situation created by the defendant.

Thus, in *Jones v. Boyce* (e), the plaintiff was an outside passenger on a coach. Through the negligence of the driver an upset seemed imminent. Accordingly he jumped off and broke his leg. Held, that the defendant was liable since by his default he had placed the plaintiff "in such a situation as obliged him to adopt the alternative of a dangerous leap or remain at certain peril".

So also, in *Brandon v. Osborne, Garrett & Co.* (f), the plaintiffs, who were husband and wife, were in a shop in which the defendants' servants were repairing a glass roof. Through their negligence part of the glass fell and injured the husband. His wife, seeing the glass falling, tried to pull her husband away, and in so doing injured herself. Held, that her action did not debar her from recovering, because "what she did was done instinctively and was in the circumstances a natural and proper thing to do".

So far, however, as concerns the adoption by the plaintiff of an "alternative danger", this rule applies only to cases of personal danger, and not to cases of danger to property (g).

Moreover, the principle does not apply where a plaintiff runs a risk, not in order to avoid alternative risks, but merely to escape slight inconvenience—as, e.g., where he falls out of a railway carriage in trying to shut a door with a defective lock (h).

It may, however, apply where the inconvenience is great,

(b) *Boy Andrew v. St. Rognvald*, [1948] A. C. at p. 149.

(c) *The Endymion*, [1938] P., at p. 50.

(d) *Chaplin v. Hawes*, 3 C. & P. 554.

(e) 1 Stark. 493.

(f) [1924] 1 K. B. 548; 98 L. J. K. B. 804.

(g) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. at p. 128; 95 L. J. P. C. 135.

(h) *Adams v. Lancashire and Yorkshire Ry.*, L. R. 4 C. P. 789; 38 L. J. C. P. 277.

and the risk is not "so great that no sensible man would have incurred it".

Thus, in *Ulayards v. Dethick* (i), the defendants, being commissioners for sewers, made a trench in the only outlet from some mews, leaving only a narrow passage, on which they heaped earth and gravel. The plaintiff, a cab proprietor, in order to get his horse out of the mews, led it over the heaped-up gravel, which gave way and allowed the horse to slip into the trench, causing its death. Held, that he was entitled to recover, as the danger was not so obvious that he could not with common prudence make the attempt.

Conversely, if the plaintiff by his negligence makes an accident so threatening that, although by appropriate measures the defendant could avoid it, the defendant has not really time to think, and by mistake takes the wrong measure, the defendant will not be held guilty of negligence and the plaintiff will fail (k).

Lastly, the contributory negligence must be that of the plaintiff himself or of someone standing in such a relation to the plaintiff that his acts or defaults must be regarded as those of the plaintiff—e.g., the relation of master and servant, or employer and agent acting within the scope of his authority (l). It was formerly thought that this principle of identification applied as between a passenger on a public vehicle and the driver: since 1888, however, it has been settled by the case of *The Bernina* that "an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions and thereby causes mischief" (m).

It was also formerly thought that a child of tender years was so far identified with an adult in whose charge he was that he could not recover if injured by the combined negligence of that adult and a third person. But it has now been held that, as a result of the decision in the case of *The Bernina*, this is no longer law and that, similarly, aged persons and "the halt, the maimed

(i) 12 Q. B. 439; 78 R. R. 305.

(k) *The Bywell Castle*, 4 P. D. 219; *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A. C., at p. 136; 91 L. J. P. C. 38.

(l) *The Bernina*; *Mills v. Armstrong*, 13 A. C., at p. 8; 57 L. J. P. 67.

(m) *The Bernina*, 13 A. C., at p. 18, overruling *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J. C. P. 336.

and the blind " are not identifiable with those in whose care they may happen to be (n).

The contributory negligence of a child may disentitle it to recover in the same way as an adult, except where the accident is due to something constituting an allurements to children or to a dangerous chattel or animal left unguarded by the defendant in a public or accessible place (o). But that which is contributory negligence in an adult is not necessarily contributory negligence in a child, who must be judged according to his age (p).

There was at one time some doubt as to whether the defence of contributory negligence could be set up in an action for the breach of a statutory duty such as the duties which by regulations made under the Factory and Workshop Act, 1921, were imposed upon employers for the protection of their workmen. Now, however, it is settled that an action for breach of such a duty is an action which is based upon negligence and in which accordingly the defence of contributory negligence can be set up (q).

*Contributory negligence in collisions between ships.*—Where a collision between two ships occurs through the fault of both, the Common Law rule did not apply so as to prevent either from recovering. The original Admiralty rule was that in such a case the loss was equally divided, and by the Judicature Act, 1878, this rule was made applicable to proceedings in all Courts. But by s. 1 of the *Maritime Conventions Act*, 1911, it was provided that where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the loss or damage shall be in proportion to the degree in which each vessel is in fault; but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally. This section does not, however, affect the rule in *Davies v. Mann* (r). Nor does it apply to damages for loss of life or personal injuries incurred by persons

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(n) *Oliver v. Birmingham, etc., Motor Omnibus Co.*, [1933] 1 K. B. 35; 102 L. J. K. B. 65, overruling *Waite v. North Eastern Ry.*, E. B. & E. 719; 28 L. J. Q. B. 268.

(o) *Latham v. Johnson*, [1913] 1 K. B. 398; 82 L. J. K. B. 258 (reviewing all the earlier authorities); *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44; 91 L. J. P. C. 49.

(p) See *Lynch v. Nurdin*, 1 Q. B. 29; 10 L. J. Q. B. 73; 55 R. R. 191.

(q) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A. C. 152; 108 L. J. K. B. 779; *Potts (or Riddell) v. Reid*, [1943] A. C. 1.

(r) *Anglo-Newfoundland, etc., Co. v. Pacific Steam Navigation Co.*, [1924] A. C. 406; 93 L. J. P. C. 187.

on board either ship. In respect of such matters the liability of each ship is joint and several, though they may recover contribution from each other in proportion to their degrees of fault (s).

**The Law Reform (Contributory Negligence) Act, 1945.**—By this Act the Common Law rules as to contributory negligence have been substantially affected.

By s. 1 it is provided—

- (1) Where any person suffers damage as the result partly of his own *fault* and partly of the *fault* of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the *fault* of the person suffering the damage but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the *responsibility* for the damage :  
 Provided that,
  - (a) This sub-section shall not operate to defeat any defence arising under a contract ;
  - (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this sub-section shall not exceed the maximum limit so applicable.
- (2) Where damages are recoverable by any person by virtue of the foregoing sub-section subject to such reduction as is therein mentioned the Court shall find and record the total damages which would have been recoverable if the claimant had not been in fault.
- (3) Section six of the Law Reform (Married Women and Tortfeasors) Act, 1935, [which relates to proceedings against, and contributions between, joint and several tortfeasors (see *ante*, p. 265)], shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-section (1) of this section in respect of the damage suffered by any person.
- (4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the

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(s) Maritime Conventions Act, 1911, ss. 2 and 3.

benefit of the estate under the Law Reform (Miscellaneous Provisions) Act, 1934 (*ante*, p. 377), the damages recoverable would be reduced under sub-section (1) of this section, any damages recoverable in an action brought for the benefit of the dependants of that person under the Fatal Accidents Acts, 1846 to 1908 (*ante*, p. 287), shall be reduced to a proportionate extent.

- (5) Where, in any case to which sub-section (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act, 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages.
- (6) Where any case to which sub-section (1) of this section applies is tried by a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been in fault and the extent to which those damages are to be reduced.

As a result of this section the Admiralty rule is applied to Common Law actions for negligence, and a plaintiff is no longer wholly defeated by his contributory negligence, but suffers a reduction in damages proportionate to his "fault", as under the Maritime Conventions Act, 1911 (*ante*, p. 377).

By s. 4 the term "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence (*t*).

The operation of the Act is illustrated by the following cases:—

In *Guinnear v. London Passenger Transport Board* (*u*) the driver of the defendants' omnibus, having slowed down to pick up the plaintiff, accelerated while the plaintiff was getting on the omnibus and caused him to fall off. It was held that, although the driver was guilty of negligence in so accelerating, the plaintiff was equally negligent in boarding a moving omnibus and accordingly was entitled to only half the damages.

In *Davies v. Swan Motor Co. (Swansea), Ltd.* (*a*), an employee of the Swansea Corporation was, contrary to the regulations of his employers, riding on steps attached to the side of a lorry belonging to the Corporation and used to enable dustmen to ascend in order to empty their baskets. An omnibus, although

(*t*) The alternative is added because there may be contributory negligence without any breach of duty owed to the defendant.

(*u*) 92 S. J. 350. See also *Davies v. Swan Motor Co.*, [1919] 2 K. B. 291.

(*a*) [1949] 2 K. B. 291.

signalled by the lorry driver to stop, and without giving any warning, overtook and struck the lorry, thereby causing injury to and the subsequent death of the man riding on the steps. His widow brought an action against the employers of the omnibus driver, who added the driver of the lorry as a third party, and claimed from him indemnity or contribution under s. 6 of the Law Reform (Tortfeasors) Act, 1935.

The trial Judge assessed the damages at £2,300 and apportioned the blame as to two-thirds on the owners of the omnibus and one-third on the driver of the lorry. The Court of Appeal approved of this apportionment, but diminished each by one-fifth by reason of the contributory negligence of the employee in not taking sufficient care of his own safety.

## SECTION 2.—*Special Duties and Liabilities*

This section includes various cases in which some special liability exists in addition to the ordinary liability for negligence.

### SUB-SECTION 1.—*Duties of an Owner or Occupier of Premises towards Persons thereon*

*A. Duties as between landlord and tenant.*—Except by express or implied agreement or by virtue of statutory provisions a landlord is not liable to his tenant or to the family, guests or servants of his tenant for any injury caused to them as such by the defective or dangerous condition of the land or premises let by him (b). Just as in the case of a purchaser of goods the Common Law rule was *caveat emptor*, so upon a lease of property it was *caveat lessee* (c). "Fraud apart there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract if any" (d).

There are, however, many cases in which a *contractual* liability exists by virtue of an implied warranty, as, for example, upon the letting of a *furnished* house (e). And, under the *Housing Act*, 1936, where a house is let at a rent not exceeding £40 in London or £26 elsewhere, there is, notwithstanding any contrary stipulation but subject to certain specified exceptions, an implied condition that the house is at the commencement of the tenancy and an undertaking that it will, during the tenancy, be kept by the landlord in all respects fit for human habitation. These

(b) *Lane v. Cox*, [1897] 1 Q. B., at p. 117; 66 L. J. Q. B. 198; *Cavalier v. Pope*, [1906] A. C., at p. 430; 75 L. J. K. B. 609.

(c) See *Firskine v. Adcane*, L. R. 8 Ch., at p. 761; 42 L. J. Ch. 835.

(d) *Robbins v. Jones*, 15 C. B. (N.S.) 221; 33 L. J. C. P. 1.

(e) *Smith v. Marrable* (the well-known "bug" case), 11 M. & W. 5; *Saison v. Roberts*, [1895] 2 Q. B. 375; 65 L. J. Q. B. 37 (furnished apartments).

obligations on the landlord have, under earlier Acts to the same effect, been held to be *contractual* (f).

These contractual liabilities of a landlord are outside the scope of this book. Certain special liabilities of a landlord will be noticed later (g).

B. *Liabilities arising out of the existence of a contract.*—  
“Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care and skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises. . . . But, subject to this limitation, it matters not whether the lack of care or skill be that of the defendant or his servants or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises. The principle . . . applies alike to premises and to vehicles. It matters not whether the subject be a race-stand, a theatre, or an inn; whether it be a taxicab, an omnibus, or a railway carriage” (h).

In such cases the defendant may be liable for negligence in failing to take such steps or make such inquiries as would have revealed the defects in question (i). But he is not liable to guard against accidents which could not reasonably be foreseen, nor is he liable for risks which are voluntarily taken by the plaintiff (k). And in this class of cases the liability of the defendant is of a *contractual* nature, depending upon an *implied* term in the contract, the nature and extent of which is for the Court. Further, since the defendant is protected by a contract, the plaintiff cannot set up a wider liability in tort (l).

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(f) *Ryall v. Kidwell & Son*, [1914] 3 K. B. 135; 88 L. J. K. B. 1110.

(g) *Post*, p. 388.

(h) *Maclean v. Segar*, [1917] 2 K. B., at p. 338; 86 L. J. K. B. 1113 (reviewing all the earlier authorities); *Hayward v. Drury Lane Theatre*, [1917] 2 K. B., at p. 914; 87 L. J. K. B. 18; *Hall v. Brooklands, etc., Club*, [1933] 1 K. B. 206.

(i) [1917] 2 K. B., at p. 334.

(k) *Hall v. Brooklands Auto Racing Club* (*ubi supra*).

(l) [1933] 1 K. B., at p. 213.



*C. Liabilities towards trespassers, licensees and invitees.*—These liabilities are in an ascending scale, the greatest being that towards an invitee (m).

*Trespassers.*—A trespasser is a person who, otherwise than by right, goes on premises without the express or implied permission of the occupier. Thus a constable who, without any legal right to enter upon premises, does so because he thinks something is wrong is merely a trespasser (n).

The general rule is that a man "trespasses at his own risk": if without right or invitation he goes on the lands of another for his own purposes, he must take the lands as he finds them and cannot throw any responsibility for their condition upon the person on whose lands he has trespassed (o).

Thus, in *Addie & Sons v. Dumbreck* (p), the defendants were a colliery company operating machinery in a field separated from the highway by a hedge in which there were large gaps. On a gate leading into the field there was a notice: "Trespassers will be prosecuted". To the knowledge of the defendants children frequented the field and used it as a playground. A child four years of age was sitting on an unprotected part of the machinery when it was started and he was killed. It was held that the defendants were not liable.

From this case, however, there must be distinguished the case of *Buckland v. Guildford Gas, etc., Co.* (q). There the defendants were electrical undertakers whose overhead wires ran about 2 feet above a tree 18 feet high and easily climable but were hidden by the foliage of the tree from anyone standing underneath

(m) For these three classes see *Latham v. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398; 83 L. J. K. B. 258; *Hayward v. Drury Lane Theatre* (*ubi supra*); *Mersey Docks, etc., Board v. Procter*, [1923] A. C. 253; 92 L. J. K. B. 479, and *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746; 94 L. J. K. B. 113 (explaining *Fairman v. Perpetual, etc., Society*, [1923] A. C. 74; 92 L. J. K. B. 50); *Addie & Sons v. Dumbreck*, [1929] A. C. 358; 98 L. J. P. O. 119; 140 L. T. 650; 45 T. L. R. 267, in each of which all the most important of the earlier authorities are reviewed. In the case of *Noiman v. Great Western Ry.*, [1915] 1 K. B. 581; 84 L. J. K. B. 598, it was held by the Divisional Court that there was a fourth class—i.e., the owner of premises who, as in the case of a railway company, is bound to admit persons to his premises, and is therefore under a greater liability than that of an invitor. It was, however, held by the Court of Appeal that the liability in such a case is merely that of an invitor, and it is now settled that there are only the three above-mentioned categories into which persons visiting premises belonging to another person can fall: *Addie & Sons, Ltd. v. Dumbreck*, [1929] A. C., at pp. 364, 371.

(n) *Great Central Ry. v. Bates*, [1921] 3 K. B. 578; 90 L. J. K. B. 1269.

(o) *Latham v. Johnson & Nephew, Ltd.*, [1913] 1 K. B., at p. 410; *Addie & Sons v. Dumbreck*, [1929] A. C., at pp. 364, 368; *Adams v. Naylor*, [1944] 1 K. B. 750; 113 L. J. K. B. 447.

(p) *Ubi supra*.

(q) [1949] 1 K. B. 410.

it. The tree was about 90 yards from an unfenced footpath crossing a field. A danger notice was on the poles supporting the wire at about 40 yards on each side of the tree but not on the tree. The plaintiff, a child of thirteen, staying at an adjoining camp who had no general permission to use the path, though the campers were in the habit of doing so by arrangement, strayed 90 yards from the path, climbed to the top of the tree and was electrocuted. *Held*, that in the circumstances it was immaterial, so far as the defendants were concerned, whether the child was an invitee, licensee or trespasser and that they were guilty of negligence in failing to protect her from a hidden peril.

The same rule applies to trespassing cattle (r) unless the owner of the land trespassed upon was, by prescription, contract or statute, under an obligation towards the plaintiff to fence against his cattle (s).

Thus, in *Ponting v. Noakes* (r), the plaintiff and the defendant were neighbours. The hedge and ditch between them belonged to the defendant who owned a yew tree the boughs of which projected partly over the ditch but not beyond it. The plaintiff's horse ate of the yew tree and died. *Held*, that the plaintiff had no cause of action since his horse was a trespasser.

And the mere fact that a tenant has covenanted with his landlord to keep fences in repair does not impose upon him any obligation towards third persons.

Although, however, the owner or occupier of land is not liable to trespassers if they injure themselves on objects legitimately on the land, he is liable for any act done with the deliberate intention of doing harm to the trespasser or with reckless disregard of the presence of the trespasser (t). Thus he is liable—

- (i) if he injures them wilfully (u), or
- (ii) if he puts dangerous traps for them intending to injure them (u), or
- (iii) if without warning or reasonable precautions he does an act which to his knowledge is likely to cause them injury (a).

(r) *Ponting v. Noakes*, [1894] 2 Q. B. 281; 63 L. J. Q. B. 549.

(s) *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; *Holgate v. Bleazard*, [1917] 1 K. B. 448; 86 L. J. K. B. 270.

(t) *Addie & Sons v. Dumbreck*, [1929] A. C., at p. 365; 98 L. J. P. C. 119.

(u) *Hardy v. Central London Ry.*, [1920] 3 K. B., at p. 473; 89 L. J. K. B. 1187.

(a) *Hillen v. I.C.I. (Alkali), Ltd.*, [1936] A. C., at p. 70; 104 L. J. K. B. 478.

To do any direct and immediate injury to a trespasser, as by striking him or throwing stones at him, would constitute a trespass to the person which would be justifiable only in the circumstances already set out (b).

To set for trespassers a man-trap or spring-gun or other trap calculated to cause serious injury to human beings is illegal at Common Law (c) and, unless set at night for the protection of dwelling-houses, by statute (d). But other traps, such as, e.g., barbed wire or broken glass may be set for trespassers (e); and traps which will injure animals may be set (f), unless they are thereby enticed on the land with the intent that they shall be thus injured (g). A person is not, however, justified in directly killing a trespassing animal, except in self-defence or in defence of his family or his own animals (h).

With regard to liability for doing acts which may injure a trespasser the law has been stated as follows: "The person who is about to do a dangerous act is under a duty to warn even trespassers. The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States; of an innocent-looking pond which contained poisonous matter. . . . There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast *when he knows that people are standing near*. In each of those cases he owes a duty to those people, even though they are trespassers, to take care to give them due warning (i).

And, as already stated (k), independently of whether the plaintiff is an invitee, licensee or trespasser, an owner, occupier or even a licensee of land may be liable for injuries caused by dangerous operations carried out by him without reasonable precautions to avoid injuries to others.

(b) *Ante*, p. 308.

(c) *Bird v. Holbrook*, 4 Bing. 628; 6 L. J. (o.s.) (C. P. 146.

(d) Offences against the Person Act, 1861, s. 31.

(e) *The Calgait*, [1927] P. 109; 96 L. J. P. 162.

(f) *Jordan v. Crump*, 5 M. & W. 782; 11 L. J. Ex. 71; 90 R. R. 929.

(g) *Townsend v. Wathen*, 10 East 277; 9 R. R. 553.

(h) *Wells v. Head*, 1 C. & P. 658; *Morris v. Nugent*, 7 C. & P. 752; *Miles v. Hutchings*, [1903] 2 K. B. 711; 72 L. J. K. B. 775.

(i) *Moulton v. Poulter*, [1930] 2 K. B. 183, at p. 191; 99 L. J. K. B. 280.

(k) *Ante*, p. 364.

*Licensees.*—A licensee is a person who is on land or premises by the permission of the occupier, such as, *e.g.*, a guest or a person who is permitted to use land for his own purposes. Great difficulty often arises in determining whether a plaintiff is a trespasser or a licensee because a trespasser may drift into becoming a licensee. There are numerous cases on this point and “circumstances vary infinitely, and you cannot *ab ante* furnish a test which will fit every case; but [to constitute a licensee] it is permission that must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to the conclusion that it was really tantamount to permission” (l). Thus a trespasser will not become a licensee merely because a proprietor does not take such measures as effectually to prevent trespass, and, if a proprietor continually protests to and turns away trespassers, no permission can be implied; on the other hand, permission may be implied where a proprietor does nothing to prevent people from habitually coming over his land or does something but “so half-heartedly as to be equivalent to doing nothing” (m).

The general rule is that “a licensee takes premises, which he is merely permitted to enter, just as he finds them” (n). But he is to some extent entitled to be protected against “traps”, that is to say, non-apparent dangers of which he had no knowledge or notice and which he could not avoid by reasonable care or prudence (o).

The extent of the protection to which he is entitled is not, however, clear. On the one hand it is quite settled that he must be protected against a *new* trap created by the licensor, *i.e.*, anything done by the licensor which by altering the condition of the premises endangers the safety of the licensee (p).

Thus, after an occupier of land has habitually allowed people to cross it he may not without notice create a danger to his licensees by putting a dangerous horse upon it (q).

On the other hand, there have been conflicting opinions as to

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(l) *Addie & Sons v. Dumbreck*, [1929] A. C., at pp. 372, 373.

(m) *Id.*, at p. 372.

(n) *Mersey Docks and Harbour Board v. Procter*, [1923] A. C., at p. 274; 92 L. J. K. B. 479.

(o) See *Indermaur v. Dames*, L. R. 2 C. P., at p. 313; *Hayward v. Drury Lane Theatre*, [1917] 2 K. B., at p. 914; *Fairman v. Perpetual Investment Society*, [1923] A. C., at p. 88.

(p) *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B., at p. 756. See also *Latham v. Johnson*, [1913] 1 K. B., at pp. 404, 405, 411; *Hayward v. Drury Lane Theatre*, [1917] 2 K. B., at p. 913.

(q) *Lowery v. Walker*, [1911] A. C. 10; 80 L. J. K. B. 138.

the duties of a licensor for traps existing at the date when the licence was given. Upon the whole, however, the balance of opinion seems to support the view that for such traps the licensor is not liable unless he knew of their existence and failed to warn the licensee (r).

*Invitees.*—The term “invitee” has, in this connection, a technical significance. It does not include a mere guest but applies only to a person who, by the express or implied invitation of the occupier or person in control of premises, comes on those premises for the purpose of the business of the occupier or upon some matter of material interest to the occupier (s). Thus a person who enters a shop for the purpose of doing business with a shopkeeper and a workman who enters premises for doing repairs are both invitees of the shopkeeper or occupier of the premises (t), but are only licensees of the owner if he is not in possession of the premises (u).

With respect to such an invitee the law has been settled for seventy years that “he using reasonable care for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows” (a). Or, as has been expressed in more recent cases, an invitor is bound to take reasonable care to avoid *having* traps of whose existence he knows.

But “this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. . . . So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser” (b). Thus, if stevedores make use of hatches which they have no right to use, or if workmen go outside the area of invitation for the purposes of their work, they are trespassers (b).

(r) *Sutton v. Dootle Corporation*, [1947] K. B. 359.

(s) See *Fairman v. Perpetual Investment, etc., Society*, [1923] A. C., at p. 80. *Glasgow Corporation v. Muir*, [1943] A. C., at p. 461. *Pearson v. Lambeth Borough Council*, [1950] W. N. 148.

(t) *Indermaur v. Dames*, L. R. 2 C. P. 311; 36 L. J. C. P. 181.

(u) *Jacobs v. London County Council*, [1950] W. N. 170.

(a) *Haseldine v. G. I. Daw & Sons, Ltd.*, [1941] 2 K. B., at p. 373. That duty he discharges by the employment of competent contractors *Ibid.* See also *Horton v. London Graving Dock Co.*, [1950] W. N. 33.

(b) *Hallen v. I.C.I. (Alkali), Ltd.*, [1936] A. C. 65, at p. 69, and see *Mersey Docks, etc., v. Procter*, [1923] A. C., at p. 260.

The obligation of an invitor is not, however, confined to the structure of the building. Thus, the lessee of a theatre is bound to take reasonable care that the performance of the play does not expose the audience to unusual danger of which he knew or ought to have known (c).

But independently of any obligation arising from the ownership or occupation of premises, if a person *creates* a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such a person a warning (d).

Thus, in *Kimber v. Gas Light and Coke Co.* (d), workmen engaged in altering a house made a dangerous hole, which they left unfenced and unguarded. The plaintiff, who had an order to view the house, fell into the hole and was injured. *Held*, that the employer of the workmen was liable.

*Liabilities towards children.*—The liabilities of an owner or occupier of premises are no greater towards children than towards adults. But “a different inference may have to be drawn from facts when dealing with the case of an infant than when dealing with an adult. For instance, what may amount to an effective warning to an adult may be no warning at all to an infant. What may amount to an invitation or a licence to a child may be neither the one nor the other to an adult” (e). Accordingly—

- i. Where an infant is in fact a trespasser the mere fact that the trespass was caused by something attractive to a child (as distinct from a malicious allurement with intent to injure) gives it no greater rights (f).
- ii. But the absence of sufficient precautions to warn and keep children off premises is a material element in considering whether an invitation or a licence is to be inferred.

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(c) *Cox v. Coulson*, [1916] 2 K. B. 177; 85 L. J. K. B. 1081. But where the performance is not inherently dangerous and the performers are an independent company and not his servants, he is not liable for every “unexpected act of negligence” by them (*id.*).

(d) *Kimber v. Gas Light and Coke Co.*, [1918] 1 K. B. 139; 87 L. J. K. B. 751.

(e) *Hardy v. Central London Ry.*, [1920] 3 K. B., at p. 465; 89 L. J. K. B. 459. A child using a public park is a licensee; *Sutton v. Boodle Corporation*, [1947] K. B. 359; 97 L. J. 28.

(f) But a child of seven years who is at a circus where no lavatory is provided does not become a trespasser by entering various parts of the circus in search of one: *Pearson v. Coleman Brothers*, [1948] 2 K. B. 359.

- iii. And when a child is on land or premises as a licensee the presence of some "fascinating and fatal" object of attraction, tempting him to meddle, may constitute a trap (g).

*Special liabilities of landlords.*—A landlord who lets premises to several tenants, retaining control of a staircase or approach which is common to all tenants, has the liability of a licensor towards persons having business with his tenants (h). He is, therefore, bound not to lay any trap for them upon such staircase or approach (i), but he is not liable for apparent and obvious dangers. Thus he is not liable for injuries caused to a visitor by an unlighted staircase (k); or by a staircase which has no railings (l); or from which a railing is missing (m).

Towards his tenants his liability is midway between that of an invitor and that which usually arises towards persons who are upon premises under contractual rights. He does not warrant that the staircase or approach is as safe as reasonable care and skill can make it, but is merely under an obligation to take reasonable care to keep it in a reasonably safe condition (n). And he is under a similar obligation with regard to all parts of the premises which he retains in his own possession and under his own control. Thus he must take reasonable care that the common roof covering all the premises and the guttering thereon is not in such a condition as to render the demised premises uninhabitable (o).

(g) See *Latham v. Johnson* (ubi supra); *Hardy v. Central London Ry.* (ubi supra); *Addie v. Dumbreck* (ubi supra); *Liddle v. Yorkshire (North Riding) County Council*, [1934] 2 K. B. 101; 103 L. J. K. B. 527 (reviewing the authorities as to children). For an example of facts constituting an invitation or licence to children, see *Cooke v. Midland Great Western Ry.*, [1909] A. C. 220; 78 L. J. P. C. 76. It has in subsequent cases been stated that the headnote to the case of *Cooke v. Midland, etc., Ry.* is inaccurate in speaking of the children as trespassers (see *Hardy v. Central London Ry.*, [1920] 3 K. B., at p. 467, and *Glasgow Corporation v. Taylor*, [1922] 1 A. C., at p. 53). See also *Williams v. Cardiff Corporation*, [1950] 1 K. B. 514.

(h) *Fairman v. Perpetual, etc., Society*, [1923] A. C. 74; 92 L. J. K. B. 50 (overruling *Miller v. Hancock*, [1893] 2 Q. B. 177). But such visitors may be invitees of the tenants: [1923] A. C., at p. 85.

(i) [1923] A. C. at pp. 86, 92.

(k) *Huggett v. Myers*, [1908] 2 K. B. 278; 77 L. J. K. B. 710.

(l) *Lucy v. Dawden*, [1914] 2 K. B. 318; 83 L. J. K. B. 523.

(m) *Dobson v. Horsley*, [1915] 1 K. B. 634; 84 L. J. K. B. 399.

(n) *Dunster v. Hollis*, [1918] 2 K. B. 795; 88 L. J. K. B. 331 (reviewing the earlier authorities).

(o) *Hargreaves & Co. v. Hartopp*, [1905] 1 K. B. 472; 74 L. J. K. B. 233; *Cockburn v. Smith*, [1924] 2 K. B. 119; 93 L. J. K. B. 761 (reviewing the earlier authorities).

SUB-SECTION 2.—*Dangerous Things. Fire*

“Anyone who—

- i. leaves a dangerous instrument, as a gun, in such a way as to cause danger, or
  - ii. without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing,
- is liable for injury caused to others by reason of his negligent act” (p).

The first branch of this rule relates to cases “where dangerous things, or things capable of being dangerous if left exposed to the interference of others, have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to persons brought into contact with them. Such cases are *Illidge v. Goodwin* and *Lynch v. Nurdin*” (q). Thus :—

In *Dixon v. Bell* (r), the defendant was held liable for entrusting a loaded gun to a servant girl of fourteen years of age, who shot the plaintiff’s son.

Similarly, in *Bebee v. Sales* (s), the defendant was held liable for damage caused by his son, who was about fifteen years of age, with an airgun, he having allowed the boy to use the gun after he had been warned that it was being used dangerously.

In *Illidge v. Goodwin* (t), the defendant left a horse and cart unattended in the street; the horse, being struck by a passer-by, backed into a shop window, and it was held that the defendant was liable for the damage so caused.

In *Lynch v. Nurdin* (u), a horse and cart were left unattended in the street and the plaintiff, a child under seven years of age, got upon the cart; another boy led the horse on and the plaintiff fell and was run over by the wheel of the cart: here again it was held that the defendant was liable.

In *Clarke v. Chambers* (a), the defendant wrongfully placed in a private road a spiked barrier, which was moved by a third person on to the footpath, where it injured the plaintiff. Held, that he was liable.

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(p) *Heaven v. Pender*, 11 Q. B. D., at p. 517; 52 L. J. Q. B. 702; 49 L. T. 357.

(q) *Weld-Blundell v. Stephens*, [1920] A. C., at p. 985; 89 L. J. K. B. 705.

(r) 5 M. & S. 198.

(s) 132 T. L. R. 413.

(t) 5 C. & P. 190.

(u) 1 Q. B. 29; 10 L. J. Q. B. 73. But an *unhorsed* van is not a dangerous thing: *Donovan v. Union Cartage Co.*, [1938] 2 K. B. 71; 102 L. J. K. B. 270.

(a) 3 Q. B. D. 327; 47 L. J. Q. B. 127.



In *Glasgow Corporation v. Taylor* (b), the defendants were the owners of a public park. Upon an open piece of ground in this park they grow a shrub bearing poisonous berries which from their appearance were attractive to children. No precautions were taken to warn children, who much frequented the park. *Held*, that the defendants were liable in respect of the death of a child of seven years of age who died through eating these berries.

In this class of cases the duty extends to anticipating and guarding against the acts of third persons : the defendant is therefore liable, although the chain of causation is broken and the accident would not have occurred but for the intervening act of a third person or of the plaintiff himself (c).

Moreover, where children are concerned, their natural instincts and temptations must, especially when the danger is not obvious, be taken into consideration in determining what is dangerous (d).

The second branch of the rule is illustrated by the case of *Clarke v. Army and Navy Co-operative Society* (e). Here the plaintiff bought from the defendants a tin of chlorinated lime, which, on being opened, exploded and injured her eyes. There was evidence that the defendants knew that at least one similar accident had previously occurred, but no warning was given to the plaintiff on purchasing. It was held that, apart from any contractual liability, there is a duty cast upon a vendor, who knows or ought to know of the dangerous character of the goods which he is supplying, and also knows that the purchaser is not, or may not be, aware of it, not to supply the goods without giving some warning to the purchaser of that danger (f).

Another illustration is afforded by the case of *Barnes v. Irwell Valley Water Board* (g). Here the plaintiff, who was the tenant of premises supplied with water by the defendants, and his wife, were poisoned by the water having become contaminated with lead. The defendants knew that the water might become poisonous if it passed through a lead pipe and that it would pass through a lead pipe on the premises occupied by the plaintiffs, but they had failed to take reasonable care to warn the plaintiffs or to protect them from being poisoned. It was held that they

(b) *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44; 91 L. J. P. C. 49.

(c) See *ante*, p. 371.

(d) See the illustrations in the text. See also *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A. C., at p. 237; 78 L. J. C. P. 76; *Latham v. Johnson*, [1913] 1 K. B., at p. 413; 82 L. J. K. B. 258. *Pearson v. Coleman Brothers, and* , p. 387.

(e) [1903] 1 K. B. 155; 72 L. J. K. B. 153.

(f) *Id.* at p. 166.

(g) [1939] 1 K. B. 91; 107 L. J. K. B. 629.

were under a duty to take reasonable care and were liable for negligence.

Where a vendor is guilty of a breach of this duty he is liable not only to the immediate purchaser but a third person. Thus, in *Burfitt v. Kille* (h) the proprietor of a toy and fancy goods shop sold a pistol (described as a "safety pistol") and fifty blank cartridges to a boy who was twelve years of age. Through a defect in its construction it became dangerous, and when fired by the purchaser injured one of his playmates, who brought an action against the vendor and succeeded on the ground that the pistol and cartridges formed a dangerous combination supplied without any warning of its danger. It must be noted that this liability for articles which are *per se* dangerous is a liability quite distinct from the liability under the rule in *Donoghue v. Stevenson* (i).

*Fire.*—At Common Law a man was *prima facie* liable for any damage done by fire originating on his own land (k).

By s. 86 of the *Fires Prevention (Metropolis) Act, 1774*, which is of general application (l), it was provided that no action should lie against any person "in whose house . . . or other building, or on whose estate any fire shall . . . accidentally begin". This exception, however, does not apply to a fire which was caused either deliberately or negligently (l), nor does it affect the liability on the principle of *Rylands v. Fletcher* (m). Accordingly, on this principle, where a person brings on his premises a dangerous thing, such as a motor car with a tank full of petrol, he is liable for the consequences of any fire which it occasions (n).

A railway company, having unqualified statutory authority to use locomotives, is not, in general, liable for damage caused by sparks from its engines (o), unless so caused by the negligence of its servants (p). But by s. 1 of the *Railway Fires Act, 1905*, as

(h) [1989] 2 K. B. 743; 108 L. J. K. B. 669.

(i) See *ante*, p. 362.

(k) *Musgrove v. Pandelis*, [1919] 2 K. B.; 88 L. J. K. B. 915.

(l) *Fuliter v. Phippard*, 11 Q. B. 847; 17 L. J. Q. B. 89; 79 R. R. 401.

(m) *Musgrove v. Pandelis* (*ubi supra*). Nor does the exception apply where the fire is a nuisance which the defendant has permitted to continue upon his property: *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B., at p. 364; 93 L. J. K. B. 261.

(n) *Id.* "The question may some day be discussed whether a fire spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does": *per Duke, L. J.*, [1919] 2 K. B., at p. 51.

(o) *Vaughan v. Taff Vale Ry.*, 5 H. & N. 679; 29 L. J. Ex. 247; 2 L. T. 394; *Canadian Pacific Ry. v. Roy*, [1903] A. C. 220; 71 L. J. P. C. 51.

(p) *Smith v. London and South Western Ry.*, L. R. 6 C. P. 14; 40 L. J. C. P. 21; 23 L. T. 678.

amended by s. 1 of the *Railway Fires Act Amendment Act, 1928*, if damage is caused to agricultural land or agricultural crops by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damages; this section does not, however, apply unless the claim for damage does not exceed £200. By s. 8 of the Amendment Act it is provided that the principal Act shall not apply unless (i) notice in writing of the fire and of intention to claim in respect thereof has been sent to the railway company within seven days of the occurrence of the damage, and (ii) particulars in writing of the damage showing the amount of the claim in money not exceeding the sum of £200 have been sent to the railway company within twenty-one days of the occurrence of the damage (q).

#### SUB-SECTION 3.—*Animals*

The responsibility of owners of animals for damage done by them "may be based on one or more of three distinct grounds of liability. The first is that known as cattle trespass. The second is based on the dangerous disposition of the animal, either because of its innate character, as in the case of lions, tigers, monkeys and others, or because, though it belongs to the tame or domestic class, it has shown a ferocious disposition, in which case proof of the *scienter* or of knowledge of its disposition is necessary to establish liability. The liability under these two causes of action . . . is strict or absolute and does not involve proof of negligence, but outside these classes of cases lies the wide general action for negligence, that is, breach of a duty to take reasonable care for the safety either of particular individuals or of individuals regarded simply as members of the public exercising their ordinary rights either on the highway or elsewhere" (r).

In each case the term "owner" includes anyone who has "possession and control" of the animal at the material time, and the test of liability is either ownership or possession and control (s).

Thus, in *North v. Wood* (t), the occupier of premises was held not liable for the acts of a dog kept on the premises, but owned by his daughter who paid for its food and its licence.

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(q) Definitions of agricultural land and crops are contained in s. 4 of the principal Act.

(r) *Brackenhorough v. Spalding U.D.C.*, [1942] A. C., at p. 820.

(s) *Knott v. London County Council*, [1984] 1 K. B., at pp. 140, 141; 103 L. J. K. B. 100.

(t) [1914] 1 K. B. 629; 83 L. J. K. B. 527.

As regards the first branch the rule is that the owner of animals in which the right of property can exist (as, *e.g.*, cattle, sheep and poultry) is bound to see that they do not stray on to the land of another person and, even without any negligence on his part, is liable for any trespass they may commit and for the natural consequences of their trespass (*u*), unless the trespass is due to the failure of such other person to fence them out when he was under a legal obligation to do so (*a*), or unless the trespass occurred while they were being driven along the highway, in which case he is liable if it was due to negligence or wilful intention on his part (*b*). But the owner of a dog or cat is not liable for its trespasses or their natural consequences (*c*). Thus the owner of a cat is not responsible when it trespasses and does damage which merely consists in following a *natural* propensity of its kind, *e.g.*, the propensity to kill fowls or pigeons (*d*). He may, however, under the second branch of liability be responsible for damage done by it when trespassing if he has knowledge of a special mischievous tendency on its part to do such damage (*e*).

In cases where liability does not arise out of trespass to land, the law recognises two distinct classes of animals, namely, (i) those which from the experience of mankind are dangerous, whether or not they are *feræ naturæ* so far as the rights of property are concerned; and (ii) those which, according to common experience, are not dangerous, such as sheep, horses and dogs (*f*), and cattle (*g*).

A person who keeps an animal of the first class does so at his peril; he is presumed to know the propensities of the *class* to which it belongs, and is liable for all mischief done by it, although he has not been guilty of any negligence and although he did not

(*u*) *Cor v. Burbidge*, 13 C. B. (N.S.) 430; 32 L. J. C. P. 89; 134 R. R. 586; *Lee v. Riley*, 18 C. B. (N.S.) 722; 84 L. J. C. P. 212; 144 R. R. 644; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; 44 L. J. C. P. 24; *Buckle v. Holmes* (*ubi supra*).

(*a*) *Ante*, p. 383.

(*b*) *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1921] 2 K. B. 76. For an example of negligence, see *Jones v. Owen*, 24 L. T. 587. As to animals straying on highways, see *post*, p. 397.

(*c*) *Brown v. Giles*, 1 C. & P. 118; 28 R. R. 769; *Sanders v. Teape*, 51 L. T. 263.

(*d*) *Buckle v. Holmes* (*ubi supra*).

(*e*) See *Read v. Edwards*, *infra*.

(*f*) *Cor v. Burbidge*, 13 C. B. (N.S.), at p. 439; *Filburn v. People's Palace, etc., Co.*, 25 Q. B. D. 258; 59 L. J. Q. B. 471; *Manton v. Brocklebank*, [1928] 2 K. B. 212; 92 L. J. K. B. 624.

(*g*) *Brackenborough v. Spalding U.D.C.*, [1912] A. C. 310.

in fact know that the particular animal had any mischievous propensities (*h*).

But as to animals which are not naturally dangerous or mischievous, the person keeping them is, at Common Law, liable only in respect of such dangerous or mischievous propensities as are known to him (*i*). Thus, in the case of a dog, if it bites a man or trespasses and kills game, and his owner knows that it is accustomed to bite men or to trespass and kill game, the owner is responsible; but, unless the *scienter* can be proved, the party injured has no remedy (*k*).

But there must be evidence of the particular propensity complained of. Thus the fact that a dog has bitten human beings is no evidence of a propensity to worry sheep (*l*); and the fact that it has bitten a goat is no evidence that it is dangerous to human beings (*m*).

In order, however, to render the owner of an animal liable for damage done in the exercise of a mischievous propensity it is not necessary to show that it has actually done that kind of damage on a previous occasion, it is sufficient to show that it has previously manifested that propensity. Thus in order to render the owner of a dog liable for damages due to its having bitten a human being, it is not necessary to prove that it has actually bitten or attempted to bite anyone else; it is sufficient to show that it is, to the owner's knowledge, ferocious towards human beings; and, even though it is not generally ferocious to human beings, it is sufficient to show that it is, to the knowledge of the owner, ferocious to them in certain circumstances which were in existence when it bit the plaintiff, as, *e.g.*, at times when it has puppies (*n*).

But evidence that a horse has a propensity to bite other horses is not evidence of a propensity to bite human beings (*o*). And the propensity of a cat with kittens to attack a dog is no

(*h*) *Filburn v. People's Palace, etc., Co.* (*ubi supra*) (elephant not known to be dangerous); and see *May v. Burdett*, 9 Q. B. 101; 16 L. J. Q. B. 64; 72 R. R. 189 (plaintiff bitten by a monkey: held, that negligence need not be alleged).

(*i*) *Manton v. Brocklebank* (*ubi supra*); *Fardon v. Harcourt Rivington*, 18 T. L. R. 215.

(*k*) *Cor v. Burbridge*, 13 C. B. (N.S.) 430; 32 L. J. C. P. 89. See *Read v. Edwards*, 17 C. B. (N.S.) 215; 34 L. J. C. P. 31; 11 L. T. 311; 142 R. R. 324. Compare, however, *Duckle v. Holmes* (*ante*, p. 393).

(*l*) *Hartley v. Hairman*, 1 B. & Ald. 620.

(*m*) *Osborn v. Chocqueel*, [1895] 2 Q. B. 109; 65 L. J. Q. B. 534.

(*n*) *Worth v. Gilling*, L. R. 2 C. P. 1; *Osborn v. Chocqueel* (*ubi supra*); *Barnes v. Lucile, Ltd.*, 96 L. T. 680; 23 T. L. R. 389. See also *Hudson v. Roberts*, 6 Ex. 679; 20 L. J. Ex. 299; 86 R. R. 438 (bull that had a propensity to run at anything red; plaintiff wearing a red handkerchief; owner held liable).

(*o*) *Glanville v. Sutton*, [1928] 1 K. B. 571; 97 L. J. K. B. 166.

evidence of a propensity to attack human beings accompanying dogs.

Thus, in *Clinton v. Lyons & Co., Ltd.* (p), the plaintiff, accompanied by a dog, entered a teashop where there was a cat with kittens, which bit the dog and also bit the plaintiff when she lifted up the dog. It was held that the defendants were not liable for the injuries to the plaintiff herself, because there was no evidence that cats with kittens are dangerous to human beings who bring dogs into shops, nor were they liable for the injuries to the dog, because though "cat and dog will fight whether the cat has kittens or not . . . it would be ridiculous to hold that for that reason every person who keeps a dog or a cat does so at his peril".

If the owner of an animal appoints a servant to keep it, the servant's knowledge of its ferocity is the knowledge of the master whether communicated to him or not (q). And a complaint made to a servant of the ferocity of an animal kept by his master upon premises where he is managing or conducting business for his master may be some evidence of the master's *scienter* (r). But the knowledge of a servant is to be imputed to his master only when it is acquired by him as such in the course of his employment on the master's behalf. Thus where a caretaker at a school kept a savage dog for his own purposes and not for the protection of the premises or otherwise for the benefit of the employers it was held (i) that the employers were not liable since they were not the owners nor in possession and control of the dog, and (ii) that in any case the caretaker's knowledge of the ferocity of the dog could not be imputed to them (s).

Where an animal does not belong to a dangerous class but is known to be dangerous, the liability of its owner is the same as if it belonged to a dangerous class, so that he is bound to keep it secure at his peril, and as in the case of a person who leaves dangerous things where others can make them a source of danger (t) is liable even though the immediate cause of any injury done by it is the intervening act of some third person.

Thus, in the case of *Baker v. Snell*, the defendant kept on his premises a dog which he knew to be savage. The dog was entrusted

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(p) [1912] 3 K. B. 198; 81 L. J. K. B. 923.

(q) *Baldwin v. Casella*, L. R. 7 Ex. 325; 41 L. J. Ex. 167.

(r) *Applebee v. Percy*, L. R. 9 C. P. 647; 43 L. J. C. P. 365, distinguishing *Stiles v. Cardiff Steam Navigation Co.*, 38 L. J. Q. B. 310, where the knowledge of servants of the defendant, not having any control over his business or over the dog, was held to afford no evidence of *scienter*.

(s) *Knott v. London County Council*, [1934] 1 K. B. 126; 103 L. J. K. B. 100.

(t) See *ante*, p. 389.

to the care of a servant who, foolishly and in breach of his duty to keep it safe, incited it to attack the plaintiff. *Held*, that a person keeping an animal known to be savage is answerable for any harm done by it even though the immediate cause of the injury is the intervening voluntary act of a third person (u).

In the case of injury by dogs to animals, the Common Law rule of liability is modified by the *Dogs Act*, 1906, which provides that "the owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such propensity, or to show that the injury was attributable to neglect on the part of the owner" (a). By s. 7 of the Act the word "cattle" includes horses, mules, asses, sheep, goats and swine; and by s. 1 of the *Dogs (Amendment) Act*, 1928, the Act of 1906 is applied to injuries done to poultry.

By s. 1 (2) of the Act of 1906 the occupier of any house or premises where the dog was permitted to live or remain at the time of the injury is presumed to be the owner, and is liable for the injury unless he proves that he was not the owner at the time. By s. 1 (3), if the damages do not exceed £5 they may be recovered under the Summary Jurisdiction Acts as a civil debt.

The similar Act of 1865 was held to apply though the cattle were trespassing at the time of the injury (b).

It must, however, be noticed that, apart from the absolute liability which rests upon the owner of an animal which he knows to be ferocious, he may also be liable for any damage caused by his animals through his own negligence, and in such a case the doctrine of *scienter* has no application.

Thus, in the case of *Smith v. Cook* (c), the defendant, being the bailee of a colt and being therefore bound to take reasonable care of it, put it in a field with some heifers, where it was killed by a bull which was in the habit of visiting the heifers. The jury having found that the defendant acted without reasonable care in putting the colt into the field, it was held that he was liable, although there was no evidence that the bull was of a mischievous disposition.

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(u) [1908] 2 K. B. 825; 77 L. J. K. B. 1090. In *Nichols v. Marsland* (L. R. 10 Ex., at p. 260; 46 L. J. Ex. 174) Baron Bramwell said: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable".

(a) 6 Edw. 7, c. 32, s. 1 (1), repealing and replacing the *Dogs Act*, 1865 (28 & 29 Vict. c. 60).

(b) *Grange v. Silcock*, 17 L. T. 340.

(c) 1 Q. B. D. 79; 45 L. J. Q. B. 122. Compare *Lee v. Riley*, *ante*, p. 393; *Manton v. Brocklebank*, *ante*, p. 394.

*Animals straying on highways.*—At Common Law the owner or occupier of land adjoining a highway is under no *prima facie* duty to fence so as to keep off the highway animals not known to be dangerous, though some special duty may be imposed by a local Inclosure Act, or by prescription or otherwise. Accordingly, in the absence of any such special duty, he is not liable, either on the ground of negligence or as for a nuisance to the highway, merely because damage is caused by the collision of other traffic with his ordinary domestic animals upon the highway (*d*).

But he will be liable if he is guilty of negligence in bringing an animal of *particular* dangerous propensities upon the highway in circumstances under which it is likely to do harm, as, *e.g.*, if he takes an unbroken colt along the highway at night without having it under proper control, and, being startled by a light on a bicycle, it bolts across the road and kicks the rider of the bicycle (*e*).

And he may be liable if he allows his animals to stray upon the highway in such numbers as inevitably to constitute a nuisance (*f*).

And apart from the liability imposed upon a person by reason of the propensities of his animals he must take reasonable care that they are not used in a manner likely to injure others. Thus a person who *brings* a horse upon a highway must take reasonable care to prevent it from causing injury to others and the amount of care that is requisite will vary according to circumstances so that it will be greater in a town than in the country. Moreover, the duty to take care does not extend merely to seeing that it is properly tethered while in the street. Accordingly a person may be liable for damage caused by a horse which escapes into a street from a stable in which it was improperly tethered (*g*).

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(*d*) *Searle v. Wallbank*, [1947] A. C. 341; [1947] L. J. R. 258.

(*e*) *Turner v. Coates*, [1917] 1 K. B. 670; 86 L. J. K. B. 321; 115 L. T. 786; 38 T. L. R. 79.

(*f*) See *Ellis v. Banyard*, 106 L. T. 51 (*per* Vaughan Williams and Kennedy, L.JJ.); *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B., at p. 380.

(*g*) *Deen v. Davies*, [1935] 2 K. B. 282; 104 L. J. K. B. 510.



## CHAPTER V

INDUCING BREACH OF CONTRACT—INTERFERENCE WITH  
FREEDOM OF ACTION—INTERFERENCE WITH DOMESTIC  
RELATIONSHIPS AND CONTRACTS OF SERVICE—SEDUCTIONSECTION 1.—*Inducing Breach of Contract and Interference  
with Freedom of Action*

It has already been pointed out (a) that every malicious (*i.e.*, unjustifiable) invasion of civil rights is actionable. This principle is not limited to cases in which there has been a trespass or nuisance, or in which damage has been caused by negligence or by the failure to perform some duty owed to the plaintiff, but it applies whenever there has been an unjustifiable interference with the exercise of any right. An early illustration is afforded by the case of *Ashby v. White* (b), where it was held that the defendant was liable to an action on the case for unjustifiably hindering the plaintiff from exercising his legal right to vote at a Parliamentary election, the rule being thus expressed by Lord Holt, whose judgment was upheld by the House of Lords: "The ground of law is plain and certain and indeed universal, that when any man is injured in his right, by being either hindered in, or deprived of, the enjoyment thereof, the law gives him an action to repair himself". And in such a case the plaintiff is not bound to prove that he has suffered any actual damage; and it is equally a tort if, though defendant has not himself violated any right of the plaintiff, he has procured the violation of any right, either by procuring a tort or a breach of contract (c).

This principle has come into prominence in many important cases in which the plaintiff has complained either of unfair trade competition, or of being boycotted, or otherwise hindered from carrying on his trade, profession, or occupation (d).

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(a) *Ante*, p. 253.

(b) 2 *Ld. Raym.* 938. For an illustration of interference with rights of personal safety, see *Wilkinson v. Downton* (*ante*, p. 253).

(c) *Lumley v. Gye*, 2 *E. & B.*, at pp. 232—234; 22 *L. J. Q. B.* 463; 95 *R. R.* 501.

(d) Some of the earlier cases relate to trade union disputes, with regard to which the law was in some respects altered by provisions of the Trade Disputes Act, 1906.

In relation to cases of this kind the following rules have been formulated :—

1. "It is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference" (e). Accordingly, if A, without legal justification, induces B to *break his contract* with C, he is liable to an action of tort at the suit of C (f).

2. It is also a violation of legal right if A, by any unlawful means (e.g., by unjustifiable compulsion, intimidation or threats) obstructs or interferes with B in the exercise of his trade, profession or calling, or prevents third persons from *entering into or continuing contracts* with him (g).

3. In neither of these two cases is it necessary for the plaintiff to prove malice in the sense of spite or ill-will (h).

4. A has no cause of action against B merely because he has suffered damage from an act "lawful in itself and carried out without employing unlawful means" (i), as, for example, where B, *without using any unlawful means*, induces third persons not to *enter into or continue* a contract with A (k), or interferes with or injures A's business by legitimate trade competition (l).

(e) *Quinn v. Leathem*, [1901] A. C. 495, at p. 510; 70 L. J. P. C. 76.

(f) *South Wales, etc., Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; 74 L. J. K. B. 525. No general rule has been laid down as to what constitutes justification. In *Brimelow v. Casson*, [1924] 1 Ch., at p. 311, it was said by Russell, J., that in determining whether or not there was justification, the points for consideration were "the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach". In *Crofter, etc., Harris Tweed Co. v. Veitch*, [1942] A. C., at p. 442, an illustration of justification given by the Lord Chancellor was that a father may persuade his daughter to break her engagement to a scoundrel: the father's justification arises from a moral duty to urge his daughter that the contract should be repudiated.

(g) *Mogul S.S. Co. v. MacGregor*, [1892] A. C. 25, at p. 37; 61 L. J. Q. B. 295; *Quinn v. Leathem* (supra). See also *Ware & De Freville v. Motor Trade Association*, [1921] 3 K. B. 40, at pp. 81—84; 90 L. J. K. B. 49. Here again no general rule has been laid down as to what constitutes justification. Note, however, that a threat does not fall within the category of unlawful means unless it is a threat to commit an illegal act; *Sorrell v. Smith*, [1925] A. C. 700; 94 L. J. Ch. 347.

(h) *Pratt v. British Medical Association*, [1919] 1 K. B. 244, at p. 266, and authorities there cited.

(i) *Harris Tweed Co. v. Veitch* (ubi supra).

(k) *Ware & De Freville v. Motor Trade Association*, [1921] 3 K. B., at p. 70; *Davies v. Thomas*, [1920] 2 Ch., at p. 197; 89 L. J. Ch. 388.

(l) *Mogul S.S. Co. v. MacGregor, Gow & Co.* (supra). There is again no definition of what constitutes legitimate trade competition. The test is whether the defendant is merely exercising his own right to advance his own interests, or whether he is, without justification, preventing the plaintiff from exercising his similar rights.

5. A lawful act by one person does not become unlawful because done with an intent to injure another (m), but an act otherwise lawful does become unlawful if done by two or more persons in combination in pursuance of a criminal conspiracy, that is to say, with the predominant purpose of damaging another person as distinct from that of protecting or promoting any lawful interest of the combiners (no illegal means being employed) (n).

Accordingly, a combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. But, if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then (in the absence of means which are in themselves unlawful, such as violence or fraud) no wrong is committed and no action will lie, although damage to another ensues (o).

The foregoing rules were laid down and applied in the following cases, to most of which reference has already been made.

In *Mogul S.S. Co. v. MacGregor, Gow & Co.*, the plaintiffs sued the defendants for conspiracy to prevent their vessels from being employed by shippers in Chinese ports. The plaintiffs and the defendants were both engaged in the tea-carrying trade. The defendants had formed an association which they had refused to allow the plaintiffs to join. They had offered special discounts to exporters who employed them alone, they had organised a system for underbidding the plaintiffs, even by accepting unremunerative rates of freight, and they had forbidden their agents, on pain of dismissal, to act as agents for the plaintiffs. *Held*, that the plaintiffs had no cause of action. There was no intent to injure the plaintiffs except in so far as such injury might be the result of lawful trade competition. Nor were any illegal means

(m) *Allen v. Flood*, [1898] A. C. 1; 67 L. J. Q. B. 119; and see *ante*, p. 251.

(n) *Crofter, etc., Harris Tweed Co. v. Veitch* [1942] A. C., at p. 445; see also *Quinn v. Leathum* (*supra*); *Ware & De Freville v. Motor Trade Association*, [1921] 3 K. B., at pp. 90, 91; *Sorrell v. Smith*, [1925] A. C., at p. 724.

(o) *Sorrell v. Smith* (*ubi supra*), reviewing the earlier authorities. "Conspiracy as a cause of action exists either when the end aimed at by the agreement is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage. An agreement is not actionable when neither the end nor the means is unlawful": *Hardie & Lane v. Chilton*, [1925] 2 K. B., at p. 913; 97 L. J. K. B. 539. "The crime of conspiracy consists in the agreement to effect an unlawful purpose, but the tort is committed only if the agreement is carried into effect and damage to the plaintiff is thereby produced". *Crofter, etc., Harris Tweed Co. v. Veitch*, [1942] A. C., at p. 445.

employed such as intimidation, violence, molestation or the procuring of people to break their contracts.

In *Allen v. Flood*, a shipbuilding firm employed the plaintiffs as shipwrights. Ironworkers on the same ship objected to the employment of the plaintiffs because, when working for another employer, they had infringed trade union rules. One of the ironworkers accordingly telegraphed to the defendant who was an official of the ironworkers' union. The defendant on his arrival discovered that the ironworkers were likely to "knock off" work unless the plaintiffs were discharged. He communicated this fact to the employers who, in consequence, at the end of the day, discharged the plaintiffs. *In so doing the employers committed no breach of contract because, although the employment of the ironworkers would ordinarily have continued until the work was done, their engagement was only from day to day and terminated at the end of each day.* Held, that the plaintiffs had no cause of action against the defendant, although, as the jury found, he maliciously induced the employers to discharge them and not to engage them again. The defendant had committed no illegal act. He had not induced the employers to commit a breach of contract. Nor had he used any illegal means such as illegal threats or intimidation. Accordingly, since his acts did not constitute a legal *injuria*, they were not actionable although they were done maliciously and had caused damage to the plaintiffs.

In *Quinn v. Leatham*, the plaintiff was a wholesale butcher and the defendants were officers of a butchers' trade union society. The plaintiff employed non-union men and refused to dismiss them. The defendants induced certain retail butchers to cease dealing with the plaintiff by threatening to call out their employees, and also induced one of the plaintiff's servants to leave him in breach of contract and others not to continue in his employment. The jury found that in so doing they acted maliciously. Held, that the plaintiff had a good cause of action. The defendants had obstructed and interfered with him by illegal means and had acted by conspiracy, not for any purpose of advancing their own interests but for the sole purpose of injuring the plaintiff in his trade.

In *South Wales, etc., Federation v. Glamorgan Coal Co.*, the officers of a miners' federation induced miners, *in breach of their contracts*, to abstain from working on certain days. They acted without any malice or ill-will towards the employers and solely with the object of keeping up the price of coal and in the interests, as they thought, of both the miners and the employers.

There was no coercion, threat or intimidation on their part. *Held*, that the employers had a good cause of action against them. They had without legal justification induced the workmen to commit an unlawful act, and the fact that they acted without malice was accordingly immaterial.

In *Ware & De Freville, Ltd. v. Motor Trade Association*, the defendants were an association of manufacturers of motor vehicles and accessories. The object of the association was to encourage the motor industry and to protect the interests of manufacturers, sellers and users of motor goods. To protect manufacturers they fixed the prices at which certain goods were to be sold. To secure the maintenance of these prices it was provided by the by-laws of the association (i) that, if any person sold or offered for sale any such goods otherwise than at the fixed price, his name might be placed upon a stop list and notice thereof might be given to all members; and (ii) that no member of the association should thereafter supply any of such goods to a person placed on the stop list and that any member so doing might also be placed on the stop list. The by-laws, however, contained provisions "intended to avoid coming into conflict with the decisions about the illegality of inducements to break existing contracts" (p). The plaintiffs, having advertised a car for sale at a price above the fixed price, were placed on a stop list which was published in various trade journals. Accordingly they brought an action for an injunction to restrain the defendants from continuing to publish their name on the stop list. In consequence of the publication some persons had refused to enter into fresh contracts to supply the plaintiffs with those protected goods but there was no evidence of any breach of contract. *Held*, that an injunction should not be granted because (i) the defendants had acted for the protection of the trade interests of the association and not in pursuance of a conspiracy to injure them; and (ii) the means employed by the defendants to carry out the object of their combination were not unlawful.

In *Brimelow v. Casson* (q), the plaintiff was the manager of a theatrical touring company. The defendants were members of a joint protection committee representing five theatrical associations. The objects of those associations were (*inter alia*) to protect the interests of theatrical performers and in particular to secure a living wage for chorus girls and so prevent them from being driven to prostitution. The defendant ran his company

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(p) [1921] 3 K. B., at p. 65.

(q) [1921] 1 Ch. 302; 93 L. J. Ch. 256.

on a profit-sharing basis which was considered highly objectionable by the associations because it was capable of great abuse. He paid his chorus girls a sum much below the minimum wage fixed by the associations and it was obvious that the whole company was leading a hand-to-mouth existence. One young unmarried girl aged about eighteen was living in immorality with another member of the company who was a tiny deformed creature, her reason for so doing being that she could not live upon her salary. There was also reason to suspect that, for the same cause, another member of the company was living in immorality. In consequence of these facts and of the general conditions under which the company was run the committee induced various theatre proprietors to break their contracts with the plaintiff and not to enter into fresh contracts with him. Their object was to drive him off the road until he paid the minimum wages. *Held*, that the defendants were justified in acting as they did. The committee, having been created with the object of protecting the theatrical calling owed a duty to their calling and its members to "take all necessary peaceful steps to terminate the payment of this insufficient wage, which in the plaintiff's company had apparently been in fact productive of those results which their past experience had led them to anticipate".

In *Sorrell v. Smith* the plaintiff was a retail newsagent who, until a date in February, 1922, had been obtaining his newspapers from a firm of wholesale agents named Ritchie. On that date, at the request of his trade union, he transferred his custom to another firm named Watson.

The defendants, who acted as a committee representing newspaper proprietors, objected to the policy of the plaintiff's trade union on the ground that it was injurious to their trade. Accordingly, in order to compel the plaintiff to return to Ritchie, they threatened to discontinue supplying their newspapers to Watson and also to a firm who supplied Watson, unless Watson gave up supplying the plaintiff. In consequence of this threat Watson, after giving proper notice of discontinuance, ceased to supply the plaintiff. *Held*, that the plaintiff had no cause of action against the defendants. They had caused no breach of contract. Though they had combined in a proceeding the necessary effect of which would have been to injure the plaintiff unless he submitted to their conditions, their purpose was to forward or defend their own trade and not to injure the plaintiff in his trade. In pursuing that purpose they had used no means that were unlawful, the

threat to withdraw custom or supplies being merely an intimation of their intention to do something which they had a legal right to do.

In *Crofter, etc., Harris Tweed Co. v. Veitch*, the appellants (plaintiffs) were manufacturers of tweed in the island of Lewis. The tweed was woven for them by crofters in their own houses, the yarn from which it was woven being imported by the plaintiffs through Stornoway, the chief port of the island: some of the finished tweeds were also exported from Stornoway. The respondents (defendants) were officials of the Transport and General Workers' Union, a trade union; all the dockers at Stornoway were members of the union. A similar tweed was made in the island by five spinning mills from yarn spun in the mills, ninety per cent. of the spinners in these mills being members of the Transport and General Workers' Union. The appellants were able to sell at lower prices than the owners of the mills. Negotiations between them to secure minimum prices having failed the respondents instructed the dockers to refuse to handle yarn imported and tweed exported by the plaintiffs. It was held that for this the appellants had no cause of action. "The predominant object of the respondents . . . was to benefit their trade union members by preventing under-cutting and unregulated competition and so helping to secure the economic stability of the island industry. The result they aimed at achieving was to create a better basis for collective bargaining, and thus directly to improve wages prospects. A combination with such an object is not unlawful, because the object is the legitimate promotion of the interests of the combiners, and because the damage necessarily inflicted on the appellants is not inflicted by criminal or tortious means and is not the 'real purpose' of the combination" (7).

By s. 3 (1) of the *Trade Disputes Act*, 1906, it is provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills". This section, however, gives no protection if the breach of a contract is induced by unjustifiable threats or violence (8). The term "trade dispute"

(1) [1912] A. C., at p. 117.

(8) *Conway v. Wade*, [1905] A. C. 306, at p. 311; 78 L. J. K. B. 1025.

means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person; and "workmen" means all persons employed in trade or industry (f). The Act accordingly applies only when such a dispute is imminent and the act is done in expectation of and with a view to it, or when such a dispute is already existing and the act is done in support of one side to it: it does not, therefore, apply to an act done from personal animosity although such act may be likely to bring about a trade dispute.

Thus, in *Counay v. Wade* (s), it was held that it did not apply where a trade union official induced the plaintiff's employers to dismiss him by threats that, unless they did so, the union men in their employment would cease to work, no trade dispute being in existence or contemplation and the threats being made out of personal animosity and in order to punish the plaintiff for not paying a fine due from him to the trade union.

The same section also provides that an act done in pursuance of an agreement between two or more persons, if so done in contemplation or furtherance of a trade dispute, shall not be actionable unless, if done without such agreement, it would have been actionable.

## SECTION 2.—*Interference with Domestic Relationships and Contracts of Service. Seduction*

Other instances of the violation of an absolute right are afforded by various kinds of interference with domestic relationships and contracts of service, in respect of which writs of trespass lay from a very early date (u).

*Husband and wife.*—A husband has a legal right to the *consortium* of his wife. He cannot now enforce that right by physical coercion (x). But he has a right of action against anyone who unjustifiably interferes with his right by procuring, enticing or persuading his wife to violate her duty of residing and consorting with him (a).

The defendant may, however, set up grounds of justification,

(f) *Id.*, s. 5.

(u) See *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 36, at pp. 44 *et seq.*; 86 L. J. P. 58.

(x) *R. v. Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346.

(a) See Bullen & Leake's *Pleadings* (3rd ed.), p. 340; *Place v. Searle*, [1932] 2 K. B. 497; 101 L. J. K. B. 465.



as, e.g., that he acted from motives of humanity and to protect her from her husband's ill-treatment (b).

A wife has a similar right of action against anyone who unjustifiably entices away her husband (c).

In either case the cause of action can be proved without proof of adultery on the part of the wife or husband (d).

A husband has also a right of action for any tort committed to his wife *per quod consortium et servitium amisit*, but, if the tort causes her death, he can recover damages only in respect of any period before her death (e).

This limitation does not, however, apply to compensation under the Fatal Accidents Acts (f). Nor does it apply where the death of a wife is caused by a breach of contract on the part of the defendant, e.g., where the wife dies through eating food which is purchased by the husband and which, in breach of the implied warranty that it is fit for human consumption, is of a poisonous character (g).

*Parent and child.*—A parent has a similar right of action in respect of any tort against his child *per quod servitium amisit* unless the child was of such tender years that it was incapable of rendering any services (h).

A father has a right to control the persons, conduct, education and services of his children until they attain twenty-one or marry. Hence a father has been held to be entitled to recover damages for the loss of services of an infant daughter from a religious community which debarred her against his wishes (i).

*Master and servant.*—A master has similar rights of action against anyone who has committed a tort against his servant *per quod servitium amisit* (j). He also has a right of action against anyone who, "with notice, interrupts the relation between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has

(b) See *Place v. Searle*, [1932] 2 K. B., at p. 513; Bullen & Leake's Pleadings (*ubi supra*).

(c) *Newlon v. Hardy*, 19 T. L. R. 522; *Elliott v. Albert* [1984] 2 K. B. 650; 103 L. J. K. B. 303.

(d) *Elliott v. Albert* (*ubi supra*).

(e) Bullen & Leake's Pleadings (*ubi supra*); *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C., at pp. 46, 55.

(f) *Ante*, p. 287.

(g) *Jackson v. Watson*, [1909] 2 K. B. 193; 78 L. J. K. B. 587.

(h) *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C., at p. 55.

(i) *Lough v. Ward*, 173 L. T. 181.

(j) *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C., at pp. 54, 55. See also Bullen & Leake's Pleadings (3rd ed.), at p. 360.

quitted it, and during the time stipulated for as the period of service" (k).

Thus, where a servant employed under a contract of service for a term breaks his contract by leaving his employment and entering the service of another employer, the second employer is liable to an action at the suit of the first, if he employed or continued to employ him with a knowledge of the breach of contract (l).

This rule is not confined to cases of master and servant in the strict sense, but applies to all contracts of employment (m).

**Seduction.**—A parent or master has also a right of action for the seduction of a daughter or female servant. An action for seduction cannot be brought by the woman seduced, who, by reason of the maxim *Volenti non fit injuria*, is precluded from maintaining an action against her seducer (n); it may, however, be brought by her parent or master in respect of any loss of services consequent upon the seduction.

In an action for seduction, the plaintiff must prove—

1. That the woman seduced was in his actual or constructive service at the time of the seduction.

2. Some actual loss of services, as by her pregnancy and confinement.

In the case of an action for the seduction of a daughter, the foundation of the action is not the relationship of parent and child but of master and servant; if, however, the daughter is under twenty-one years of age, "no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family" (o). But if the daughter is over twenty-one years of age, the father must prove either a contract of service or actual service, and "where actual services are rendered, whatever their character, and however personal to the mother, they are deemed to be rendered to the father and not to the mother, and are rendered to him not as the father but in his capacity as master of the house and home" (p). Accordingly, where the woman seduced was the adopted daughter of, and resided with, a married woman living with her husband, it was

(k) *Lumley & Gye*, 2 E. & B. 216, at p. 224; 23 L. J. Q. R. 463.

(l) *Wilkins & Brothers, Ltd. v. Weaver*, [1915] 2 Ch. 322; 84 L. J. Ch. 229.

(m) *Lumley v. Gye* (*supra*); *De Francesco v. Barnum*, 63 L. T. 514.

(n) She can, however, take affiliation proceedings in a Court of Summary Jurisdiction; and in an action for breach of promise of marriage, the damages may be aggravated by proof of seduction.

(o) *Evans v. Wallon*, L. R. 2 C. P., at p. 619.

(p) *Beetham v. James*, [1937] 1 K. B. 527; 106 L. J. K. B. 363.

held that an action for her seduction could not be maintained by the wife, because, while husband and wife are living together, any domestic servant employed by them is the servant of the husband and not of the wife (*q*). And where services are so rendered it is immaterial that the father is not married to the mother (*r*).

The service must exist "at the time of the seduction, and also at the time of the illness consequent upon it that deprives the plaintiff of the girl's services" (*s*).

Thus, in *Hedges v. Tagg* (*t*), the plaintiff's daughter was in service as a governess, but was seduced during a three days' visit to the plaintiff with her employer's permission. When her confinement took place she was in the service of another employer. *Held*, (i) that at the time of the seduction there was no relationship of master and servant between the plaintiff and her daughter; and (ii) that the action also failed on the ground that the confinement caused no loss of service to the plaintiff, the daughter being at that time in another situation.

Therefore, where a girl was seduced while living at home, but a child was born after her father's death, it was held that her mother could not maintain an action by reason of the ordinary household services rendered to her by the girl after her father's death (*u*).

A daughter is not in her father's service if she is permanently living away from home and maintaining a separate establishment of her own (*x*); but the mere fact that she is married does not prevent her father from maintaining an action if she is separated from her husband and lives with her father (*y*).

So also a daughter who is living with and in the service of another person is not in her father's service although she is permitted to go home for a short time once a week and during such time she assists in household duties (*z*). But as soon as an infant daughter's service with an employer ceases, the right of her father to her services revives, so that she immediately becomes in his constructive service.

So, in the case of *Terry v. Hutchinson* (*a*), it was held that the plaintiff could maintain an action for the seduction of his daughter,

(*q*) *Peters v. Jones*, [1914] 2 K. B. 781; 83 L. J. K. B. 1115.

(*r*) *Beecham v. James* (*ubi supra*).

(*s*) *Peters v. Jones*, [1914] 2 K. B., at p. 785.

(*t*) L. R. 7 Ex. 283; 41 L. J. Ex. 169.

(*u*) *Wamilton v. Long*, [1905] 2 Ir. R. 252 (approved in *Peters v. Jones* (*ubi supra*)).

(*x*) *Manley v. Field*, 7 C. B. (N.S.) 96; 29 L. J. C. P. 79.

(*y*) *Harper v. Luffkin*, 7 B. & C. 387; 6 L. J. K. B. 23.

(*z*) *Whitbourne v. Williams*, [1901] 2 K. B. 722; 70 L. J. K. B. 933.

(*a*) L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.

who was seduced in a railway carriage while on her way home, having been dismissed from her employment.

But a daughter does not cease to be in the service of her father because she is away from home on a visit (*b*), nor because employed elsewhere by a master for only part of the day, so that during the remainder of the day she is free to render services to her father; and in such a case her father can maintain an action for seduction against her master (*c*).

And it has been held that a father can maintain an action against a master who has hired his daughter for the purpose of seducing her (*d*).

*Damages.*—Exemplary damages may be given in an action for seduction (*e*), except when it is brought by a plaintiff who is merely the master and not the parent of the woman seduced (*f*). Conversely the defendant, in mitigation of damages, may prove that the woman seduced was of loose or immoral character (*g*).

*Defences.*—As a defence to the action, it may be proved (i) that the plaintiff brought about the seduction by his own acts (e.g., by encouraging any improper intimacy) (*h*), or (ii) that although the defendant debauched the woman, he was not the father of the child of which she was delivered (*i*).

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(*b*) *Griffiths v. Teitgen*, 15 C. B. 341; 24 L. J. C. P. 35.

(*c*) *Rist v. Faux*, 4 B. & S. 109; 32 L. J. Q. B. 386.

(*d*) *Speight v. Olivier*, 2 Stark. 193; 20 R. R. 728.

(*e*) See *Terry v. Hutchinson* (*ubi supra*).

(*f*) *McKenzie v. Hardinge*, 23 T. L. R. 15.

(*g*) *Verry v. Watkins*, 7 C. & P. 308.

(*h*) *Reddie v. Scott*, 1 Peake 240.

(*i*) *Eager v. Grimwood*, 16 L. J. Ex. 236; 74 R. R. 584.

## CHAPTER VI

## IMPROPER USE OF LEGAL PROCESS

SECTION 1.—*Malicious Abuse of Legal Process*

**Malicious prosecution.**—In an action for malicious prosecution, the plaintiff must prove that (1) proceedings involving damage to his fair fame, person or property, (2) which terminated in his favour, (3) were instituted against him by the defendant, (4) without reasonable and probable cause, and (5) maliciously.

1. The alternative conditions of an action for malicious prosecution are “first, that there must be damage to a man’s fame, as if the matter whereof he is accused be scandalous; secondly, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and, thirdly, damage to a man’s property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused” (a).

An action for malicious prosecution *may* lie in respect of civil proceedings, but it is in very few cases that it can do so, because in an ordinary civil action none of these heads of damage can arise, for (i) if scandalous allegations are made against a man, his fair fame will be cleared at the trial of the action, if it deserves to be cleared; (ii) although a judgment, even in an ordinary action for debt, may be followed by imprisonment under s. 5 of the Debtors Act, 1869, this does not satisfy the second head of damage, because the person is not imprisoned by virtue of the proceedings, but only as an ultimate result of his non-compliance with his obligation to pay money; (iii) the difference between the costs which a successful defendant has to pay and those which he will receive from his opponent is not legal damage (b).

As a general rule, therefore, an action for malicious prosecution is brought where criminal proceedings have been taken against the plaintiff—that is to say, proceedings as a result of

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(a) *Wiffen v. Bailey and Romford Urban Council*, [1915] 1 K. B., at pp. 606, 607; 81 L. J. K. B. 688, citing *Savile v. Roberts*, 2 Ld. Raym., at p. 378.

(b) *Wiffen v. Bailey and Romford Urban Council*, [1915] 1 K. B., at pp. 606–608. See also *Cotterell v. Jones*, 11 C. B. 713; 21 L. J. C. P. 2; 87 R. R. 754; *Corbett v. Burge*, 48 T. L. R. 626.

which punishment for an offence may be inflicted by way of imprisonment, fine, or otherwise (c). But even where criminal proceedings have been instituted maliciously and without reasonable and probable cause, no action will lie unless the plaintiff can prove one of the foregoing kinds of damage.

Thus, in *Wiffen v. Bailey and Romford Urban Council* (d), where proceedings had been brought against the plaintiff for neglect to comply with a notice from the urban sanitary authority requiring him to do certain repairs to a house, it was held that no action would lie in respect of these proceedings, because (i) they did not necessarily involve damage to his fair fame; (ii) they did not necessarily result in imprisonment (though this might follow if he did not pay any fine that might have been imposed); (iii) he had not suffered legal damage merely because he had incurred expenses in excess of the costs awarded him.

But the prosecution of a man for avoiding payment of his fare in a tramcar will support an action for malicious prosecution, as it is a prosecution for an act which reflects upon his character (e).

2. The plaintiff must prove that the proceedings terminated in his favour, if from their nature they were capable of such termination (f). Thus, if a man has been tried and convicted, he cannot maintain an action for malicious prosecution so long as the conviction stands, for it is not possible for another Court, not being a Court of Appeal, to hold that the conviction was without reasonable and probable cause (g).

3. The plaintiff must prove that the proceedings were instituted by the defendant before a *judicial* officer or tribunal,

(c) The mere fact that proceedings *may* terminate in imprisonment does not make them criminal proceedings: the test is whether the imprisonment is punishment for an offence or a means of enforcing obedience to an order of the Court: *Wiffen v. Bailey and Romford Urban Council*, *ubi supra*; and see *R. v. Whitchurch*, 7 Q. B. D. 534; 50 L. J. M. C. 99; 45 L. T. 379; *Rayson v. South London Tramways Co.*, [1893] 2 Q. B. 304; 62 L. J. Q. B. 593; 69 L. T. 491; *Seldon v. Wilde*, [1911] 1 K. B. 701; 80 L. J. K. B. 282; 104 L. T. 194.

(d) *Ubi supra*.

(e) *Rayson v. South London Tramways Co.* (*ubi supra*), as explained in *Wiffen v. Bailey* (*ubi supra*).

(f) *Basébé v. Matthews*, L. R. 2 C. P., at p. 698; 36 L. J. M. C. 93; 16 L. T. 417. *Secus*, where such proof is impossible; see *Steward v. Gromett*, 7 C. B. (N.S.) 191; 29 L. J. C. P. 170; 121 R. R. 451. But it makes no difference that the party convicted has no power of appealing: *Basébé v. Matthews* (*ubi supra*).

(g) *Metropolitan Bank v. Pooley*, 10 A. C., at pp. 216, 217; 51 L. J. Q. B. 149; *Basébé v. Matthews* (*ubi supra*).

as, *e.g.*, by laying an information before a magistrate or taking an active part in any stage of a prosecution (*h*).

4 and 5. The plaintiff must prove both *malice in fact* and *absence of reasonable and probable cause*. If a defendant has a reasonable and probable cause for putting the law in motion, the exercise of his legal right is not wrongful because it is prompted by malice in fact. And even if in fact he has no reasonable and probable cause his act is justified by an honest belief in its existence. But if to the absence of such cause a malicious motive is added (which may be inferred from his knowledge of the absence of reasonable and probable cause) his act becomes wrongful and actionable (*i*).

It must be noted that in false imprisonment the act of the defendant is *prima facie* unjustifiable; the plaintiff need only in the first instance prove the imprisonment, the burden then shifting to the defendant to prove some justification or excuse. In malicious prosecution, on the other hand, the act of the defendant is *prima facie* justifiable, and the plaintiff must in the first instance prove malice and absence of reasonable cause (*k*).

In practice the first essential is to prove the *absence* of reasonable and probable cause, but very slight evidence of its absence may be sufficient to call upon the defendant to prove its existence (*l*).

What constitutes reasonable and probable cause has been thus stated: "Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*m*). Whether or not there is an absence of reasonable and probable cause is a question of fact for the Judge, but it is for the jury to find any relevant facts that are disputed, as, for instance,

(*h*) See *Else v. Smith*, 1 D. & R. 97; 21 R. R. 639; and *Fitzjohn v. Mackinder*, 9 C. B. (N.S.) 505; 30 L. J. C. P. 257; 127 R. R. 746, where this point is fully discussed.

(*i*) See *ante*, p. 254.

(*k*) *Abrath v. North Eastern Ry.*, 11 A. C., at p. 255; 55 L. J. Q. B. 457.

(*l*) *Abrath v. North Eastern Ry.*, 11 A. C., at p. 250. See also *Cotton v. James*, 1 B. & Ad., at p. 138; 8 L. J. (o.s.) K. B. 315; 35 R. R. 244; *Taylor v. Williams*, 2 B. & Ad., at p. 857; 1 L. J. K. B. 17; 31 R. R. 879.

(*m*) *Hicks v. Faulkner*, 8 Q. B. D., at p. 171; 51 L. J. Q. B. 268; approved in *Horniman v. Smith*, [1938] A. C., at p. 316; 107 L. J. K. B. 225.

whether any statements, which the prosecutor alleges were made to him, were in fact made, or if any documents, which he says he saw, were in fact seen by him, and in the form in which he says he saw them (n). It must be noted that mere honest belief does not necessarily constitute reasonable and probable cause, for if the defendant came to his conclusion rashly and inconsiderately, he was not warranted in acting on his belief (o). "The crucial points are—Did the prosecutor believe the story on which he acted? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence?" (p).

The malice that must be proved is malice in fact, that is to say, some wrong or indirect motive, some motive other than that of bringing to justice a person honestly believed to be guilty (q). The absence of reasonable and probable cause is some evidence from which malice *may* be inferred by the jury, but it must be considered with all the other facts of the case which go to establish the existence or non-existence of malice. Thus, if, although there is no reasonable and probable cause, the jury find that the defendant had an honest belief in the plaintiff's guilt, some further evidence of malice is necessary (r). A prosecution which at the outset is not malicious may become so by the continuance of it after knowledge of the innocence of the accused (s). It was at one time doubtful whether a corporation could be guilty of malice in fact, but it is now settled that an action of malicious prosecution can be brought against a corporation (t).

**Malicious abuse of other process.**—An action will lie for the institution, maliciously and without reasonable and probable cause, of bankruptcy or winding-up proceedings (u), because such proceedings necessarily involve injury to credit, and the same principle applies where the goods of a debtor are taken in

(n) *Horniman v. Smith* (*ubi supra*).

(o) *Douglas v. Corbett*, 6 E. & B., at p. 515.

(p) *Corca v. Peiris*, [1909] A. C., at p. 555.

(q) *Brown v. Hawkes*, [1891] 2 Q. B., at pp. 722, 723. See also *ante*, p. 254.

(r) [1891] 2 Q. B., at pp. 726, 729.

(s) *Fitzjohn v. Mackinder*, 9 C. B. (N.S.), at p. 531; 30 L. J. C. P. 261.

(t) *Cornford v. Carlton Bank*, [1899] 1 Q. B. 302; 68 L. J. Q. B. 196; [1900] 1 Q. B. 22; 69 L. J. Q. B. 1020 (in the Court of Appeal it was conceded that the action would lie).

(u) *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 671; 52 L. J. Q. B. 488.



execution for a larger sum than is due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause (x). So, also, an action may be brought by a person who, maliciously and without reasonable and probable cause, is arrested on civil process (a). And an action may be brought for the malicious procurement of the issue of a search warrant (b). In these cases also, as in an action for malicious prosecution, the plaintiff must prove that the proceedings terminated in his favour, if they were capable of so terminating (c).

(x) *Churchill v. Siggers*, 3 E. & B., at p. 937; 23 L. J. Q. B. 308; 97 R. R. 837. If the writ of execution is void *ab initio*, an action of trespass will lie, in which no proof of malice or absence of reasonable and probable cause is necessary (*Clissold v. Gratchley*, [1910] 2 K. B. 244; 79 L. J. K. B. 685). If judgment is signed for more than is due, an execution for the full amount due under the judgment is not actionable until the judgment has been rectified: *Huffer v. Allen*, L. R. 2 Ex. 15; 36 L. J. Ex. 17.

(a) Arrest under civil process no longer exists except (i) in bankruptcy and winding-up proceedings; (ii) for contempt of Court (see *Scott v. Scott*, [1913] A. C. 417; 82 L. J. P. 74); (iii) under the Debtors Act, 1869.

The Debtors Act, 1869, practically abolished imprisonment for debt by providing that, with the exceptions therein mentioned, no person shall be imprisoned for making default in payment of a sum of money. These exceptions are (s. 4): (i) Default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract; (ii) Default in payment of a sum recoverable summarily before a justice or justices of the peace; (iii) Default by a trustee or person acting in a fiduciary capacity and ordered by the Court to pay any sum of money in his possession or under his control; (iv) Default by a solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order; (v) Default in payment for the benefit of creditors of any portion of a salary or other income, in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order; (vi) Default in payment of sums in respect of the payment of which orders are authorised by the Act to be made.

But by s. 5 of the Act it is provided that, subject to the restrictions therein contained, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court, provided that it is proved to the satisfaction of the Court that such person has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same. And, by s. 6 of the Act, a plaintiff in an action in the High Court may, in certain cases, and subject to certain conditions, obtain from a Judge of the High Court an order for the arrest of a defendant who is reasonably believed to be about to quit England.

(b) See *Hensworth v. Forkes*, 4 B. & Ad. 449; 2 L. J. K. B. 72; *Hope v. Evered*, 17 Q. B. D. 338. 55 L. J. M. C. 146.

(c) Thus, if he has been adjudicated bankrupt, he cannot maintain an action until the adjudication has been annulled: *Metropolitan Bank v. Pooley* (*ante*, p. 411). *Secus*, if such proof is impossible, e.g., in an action for malicious execution: *Gilding v. Eyre*, 10 C. B. (N.S.) 592; 81 L. J. C. P. 174; 128 R. R. 847.

## SECTION 2.—*Maintenance and Champerty*

**Maintenance** is a Common Law misdemeanour (d) for which an action on the case may be brought if special damage has thereby been occasioned to the plaintiff.

Maintenance is defined as existing "where one officiously intermeddles in a suit . . . which in no way belongs to him, by assisting either party, with money or otherwise, in the prosecution or defence of any such suit" (e).

It is not necessary for the plaintiff to show that the action or defence maintained against him has failed or was unfounded, or that it was maintained by procuring false evidence or in some other unlawful way (f). But the action for maintenance at Common Law is not an action for the invasion of an absolute right, and can be brought only by a person who has suffered some special damage; it is not sufficient for the plaintiff to show that he has been compelled to discharge his legal obligations, or that he has incurred expenses in endeavouring to evade them (g).

The doctrine of maintenance does not apply to criminal proceedings (h). Nor is there any analogy between the actions for maintenance and for malicious prosecution, because every person acting on behalf of the Sovereign, as all prosecutors in effect do, is justified, in the interests of society, in putting the criminal law in motion if he does so without malice and with reasonable and probable cause. There is, in such a case, no officious intermeddling in litigation that does not concern the meddler (i).

The illegality of maintenance rests upon considerations of public policy, and as notions of public policy have changed, much of the old Common Law of maintenance has become obsolete, so that many transactions and agreements which were formerly held to amount to maintenance are now valid. This is particularly the case with regard to assignments of choses in action. There are many choses in action which never were and

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(d) See *Neville v. London "Express" Newspaper, Ltd.*, [1919] A. C., at p. 378; 88 L. J. K. B. 282.

(e) *Hawkins' Pleas of the Crown* (8th ed.), vol. 1, at p. 154, cited [1919] A. C. at p. 386. See also *British Cash, etc., Conveyors, Ltd. v. Jamson, etc., Co., Ltd.*, [1908] 1 K. B., at pp. 1019, 1020; 77 L. J. K. B. 649.

(f) [1919] A. C., at pp. 381, 382.

(g) [1919] A. C., at pp. 379, 380. The rule that special damage must be proved does not, however, apply to an action for the recovery of a penalty imposed by certain early statutes upon particular forms of maintenance: [1919] A. C., at pp. 380, 386.

(h) *Grant v. Thompson*, 72 L. T. 264.

(i) [1919] A. C., at p. 401.

are not assignable either at law or in equity because their assignment is merely the assignment of a right of action and so savours of maintenance. A right of action to set aside a contract on the ground of fraud is a typical instance (*k*). Another instance is the right to sue for unliquidated damages for tort (*l*).

But, though this doctrine applied at Common Law to debts, their assignment was permitted in Equity on the ground that they were property, and this view ultimately prevailed in all Courts (*m*). Accordingly, since there is a right to assign a debt, its assignment is not invalid on the ground of maintenance merely because the *motive* of the assignee is to obtain a judgment which will enable him to take bankruptcy proceedings against the debtor for the furtherance of some ulterior object as, *e.g.*, in order to obtain his removal from a board of directors (*n*).

So, also, contracts of indemnity against claims made by third persons were at one time considered to savour of maintenance, but now they are well known to the law and in no way offensive to it, even though they may involve or contemplate the institution or defence of an action, unless there is something improper in their nature arising out of the circumstances attending their origin (*o*).

*Justification for maintenance.*—"A common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. . . . But . . . the instances which they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending his rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself . . . or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, *e.g.*, as master and servant, or that which charity

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(*k*) *Fitzroy v. Carr*, [1905] 2 K. B. 361; at p. 371; 71 L. J. K. B. 829.

(*l*) *Defries v. Milne*, [1913] 1 Ch. 98; 82 L. J. Ch. 1.

(*m*) See *ante*, p. 191.

(*n*) *Fitzroy v. Carr* (*supra*).

(*o*) See the judgment of Fletcher Moulton, L.J., in *British Cash, etc., Conveyors v. Lamson, etc., Co., Ltd.*, [1908] 1 K. B. 1006; 77 L. J. K. B. 649.

and compassion give a man in behalf of a poor man, who, but for the aid of his rich helper, could not assert his rights" (p).

But the list of exceptions given in the preceding paragraph is not exhaustive (q), and justification may arise from any common interest "of a character which is such that the law recognises it" (r).

Thus, the members of a trade may combine in order to contest a decision against one of them which threatens the interest of all carrying on the same trade, just as fellow commoners may combine to defend their rights of common (s). And the giving of an indemnity against actions by third parties is justifiable, if it is given in the protection of a trade or business interest.

So, in *British Cash, etc., Conveyors v. Lamson, etc., Co.* (t), the plaintiffs and the defendants were rival manufacturers of an apparatus for conveying cash from one part of business premises to another. The defendants, by legitimate means, obtained orders from persons who were using the plaintiffs' apparatus, and gave to those persons an indemnity against any claims for breach of contract that might be made against them by the plaintiffs. It was held that the giving of the indemnity was justified by the business interest which the defendants had in the protection of their customers.

But a libel action is a personal action which in point of law concerns only the parties to it, and the mere circumstance that there must or may arise in it questions of fact, in the determination of which a third party has an interest, will not constitute a common interest sufficient to justify maintenance by such third party (u).

Thus, in the case of *Alabaster v. Harness* (x), the defendant employed T., as an electrical expert, to report upon an electric belt manufactured by him, and published his report in a pamphlet. The plaintiff, a newspaper proprietor, published an article in which he commented adversely upon the report and upon the defendant's appliances and upon T.'s qualifications and conduct. T. in consequence brought an action for libel against the plaintiff, the action being instigated by the defendant, who employed a solicitor

(p) *Bradlaugh v. Newdegate*, 11 Q. B. D., at p. 11; 52 L. J. Q. B. 454. As to common interest, see also *Findon v. Parker*, 11 M. & W. 676; and as to charity, see *Harris v. Brisco*, 17 Q. B. D. 501; 55 L. J. Q. B. 428.

(q) *British Cash, etc., Conveyors, Ltd. v. Lamson, etc., Co., Ltd.*, [1908] 1 K. B., at p. 1014.

(r) *Neville Co. v. London "Express" Newspaper, Ltd.*, [1919] A. C., at p. 889; 88 L. J. K. B. 282.

(s) *Plating Co. v. Farquharson*, 17 Ch. D. 49; 50 L. J. Ch. 406.

(t) [1908] 1 K. B. 1006; 77 L. J. K. B. 649.

(u) *Oram v. Hutt*, [1914] 1 Ch., at p. 104; 83 L. J. Ch. 161.

(x) [1895] 1 Q. B. 339; 64 L. J. Q. B. 76.

nominated by himself to conduct the case, and found money for the purposes of the action. The action resulted in a verdict against T., who was unable to pay the costs, and the plaintiff therefore brought an action against the defendant claiming the amount of them as damages, on the ground that the defendant had unlawfully maintained T. in bringing his action. It was held that the defendant had no common interest with T. justifying his maintenance of the action merely because in that action questions incidentally arose which might affect him.

So also, in *Oram v. Hutt* (u), it was held that a trade union has no legal common interest in a slander action brought by one of its officers, even though the latter is slandered not only personally but also by way of his office so that the union is adversely affected, and, accordingly, that the payment of the officer's costs out of the funds of the union, in pursuance of an indemnity given by the union before action, was obnoxious to the law of maintenance and *ultra vires*.

As regards justification on the ground of charity, it has been held that assistance given to a poor man by a rich man is none the less charitable merely because it is also induced by common religious sympathy (y).

**Champerty.**—"Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute. . . . Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus" (a).

Any bargain whereby the one party is to assist the other in recovering property and is to share in the proceeds of the property, is illegal (b). "A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom information is to be given, and nothing more, is not champerty. . . . But if the arrangement come to is not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered shall himself recover the property or actively assist in the recovery of it by procuring evidence or similar means, then I think the arrangement is contrary to the policy of the law" (c).

By s. 59 of the *Solicitors Act*, 1932, a solicitor may make any agreement in writing with his client as to his remuneration in

(y) *Holden v. Thompson*, [1907] 2 K. B. 489; 76 L. J. K. B. 589.

(a) *Neville v. London "Express" Newspaper*, [1919] A. C., at p. 382, 68 L. J. K. B. 649, citing *Coke Inst.* 2, p. 208.

(b) *Hutley v. Hutley*, L. R. 8 Q. B., at p. 115; 42 L. J. Q. B. 52, citing *Sprye v. Porter*, 7 E. & B. 58; 26 L. J. Q. B. 61; 110 R. R. 498.

(c) *Russ v. De Bernardy* [1896] 2 Ch., at p. 447; 65 L. J. Ch. 656.

respect of contentious business. But, to guard against champerty, it is provided by s. 62 that "nothing in the foregoing section shall give validity to any purchase by a solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding or to any agreement by which a solicitor, retained or employed to prosecute any such suit or action, stipulates for payment only in the event of success in such action, suit, or proceeding" (d).

Thus, under the similar provisions of the Attorneys and Solicitors Act, 1870, it was held to be champerty for a solicitor to conduct proceedings for the recovery of debts upon the terms of getting a percentage upon the amount recovered (e).

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(d) See *Re Attorneys and Solicitors Act, 1870*, 1 Ch. D. 763; *Wild v. Simpson*, [1919] 2 K. B. 514; 88 Ll. J. K. B. 1085.

(e) *Re A Solicitor*, [1912] 1 K. B. 362; 81 Ll. J. K. B. 215.

## CHAPTER VII

## FRAUD—PASSING-OFF ACTIONS

SECTION 1.—*Fraud*

AN action of deceit lay at Common Law whenever the defendant had made a fraudulent misrepresentation of fact, with intent to induce the plaintiff to act upon it and had induced the plaintiff to act upon it to his loss (a). This cause of action usually arose where, by the fraudulent misrepresentation, the plaintiff had been induced to enter into a contract with the defendant himself, and the rules applicable to such cases have already been discussed (b).

But an action of fraud will also lie when by the fraud of the defendant the plaintiff has been induced to enter into a contract with a third person, as, for example, where a financial agent fraudulently induced the plaintiff to take shares in a company (c). And, even though the plaintiff has not actually been induced to enter into any contract with the defendant or a third person, he may maintain an action of deceit if he has suffered damage through acting on the fraudulent misrepresentations of the defendant.

Thus, in the case of *Richardson v. Silvester* (d), the defendant inserted in a newspaper an advertisement for the letting by tender of a farm: the plaintiff, believing in the *bona fides* of the advertisement, incurred expense in inspecting the property and employing persons to value it: the defendant, however, knew that the farm was not to let, and that he had no power to let it, and inserted the advertisement to serve some purpose of his own: it was accordingly held that these facts disclosed a cause of action for deceit.

**Fraudulent representations as to a person's credit.**—After the passing of the Statute of Frauds no action could be brought upon a *guarantee* in the absence of the written evidence required by s. 4 of that statute (e). But, in the course of the eighteenth century, there was a series of cases, commencing with *Pasley v. Freeman* (f), in which the defendant was charged, not *ex*

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(a) Bullen & Leake's Pleadings (3rd ed.), p. 338.

(b) *Ante*, pp. 102, 107. The effect of fraud upon conveyances and transfers of property has also been noted: *ante*, pp. 72, 73.

(c) See *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59; 54 L. J. Q. B. 818.

(d) L. B. 9 Q. B. 34; 43 L. J. Q. B. 1; 39 L. T. 398.

(e) *Ante*, p. 64.

(f) (1789), 3 T. R. 51.

*contractu* upon a *promise* to answer for the solvency of another, but *ex delicto* upon a *false representation* as to the character or credit of another. This, however, was considered to be an evasion of the Statute of Frauds, and therefore in 1828 Lord Tenterden's Act (g) made it necessary that there should be written evidence when credit was given on the faith of a representation as well as when it was given on the faith of a promise (h). By s. 6 of this Act it is provided that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon (i), unless such representation or assurance be made in writing, signed by the party to be charged therewith".

The section applies only to *fraudulent* misrepresentations; it does not apply to innocent misrepresentations in which the cause of action is a negligent breach of duty (k).

Thus, in *Banbury v. Bank of Montreal* (k), the defendants, as bankers, advised their customers as to Canadian investments. The plaintiff was a customer. The defendants, by one of their local managers, orally advised the plaintiff to invest money in a lumber company. The advice, which was honestly but negligently given, involved representations as to the credit of the lumber company. The plaintiff, relying upon the advice, invested his money in the lumber company and lost it. He accordingly brought an action against the defendants for negligence and breach of duty while acting as his advisers and bankers. *Held*, that Lord Tenterden's Act did not apply to the action.

The section applies, however, not only where the representation is made for the benefit of a third person alone, but also where it is made in order that the party to be charged may obtain a benefit from the credit, money or goods obtained by such third person (l).

Under Lord Tenterden's Act, the writing must be signed "by the party to be charged therewith; the signature of an agent will

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(g) The Statute of Frauds Amendment Act: 9 Geo. 4, c. 14.

(h) For a full explanation, see *Lyde v. Barnard*, 1 M. & W. 101; 5 L. J. Ex. 117.

(i) The Act is printed as in the text, but must be read either as if it were "may obtain money or goods upon credit" or "may obtain credit, money or goods upon such representation": *Lyde v. Barnard*, 1 M. & W., at pp. 104, 105.

(k) *Banbury v. Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158.

(l) *Pearson v. Seligman*, 48 L. T. 842.



not suffice" (m). Accordingly, the signature of one partner in a firm does not render the other partners liable (n); nor is a corporation (which is a "person" within the meaning of the Act) liable for a false representation of the kind contemplated by the Act made in a letter written and signed by its agent (o).

## SECTION 2.—*Passing-off Actions*

Another species of Common Law fraud exists where one person passes off his goods as those of another.

The right to the exclusive use of a *trade mark* is now obtained only by registration under the Trade Marks Acts, which are outside the scope of this book.

Before 1875 this right might be obtained by user, and it was a well-established rule of the Common Law "that no man has a right to put off his goods for sale as the goods of a rival trader, and he cannot therefore . . . be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person" (p).

The requirements of registration for *trade marks* was introduced by the Trade Marks Act, 1875, but neither that Act nor the Acts now in force have affected the principle that no man may sell his goods under a designation which deceives purchasers by conveying the false representation that they are the goods of another person (q).

Accordingly, where goods are sold under a name by which they have become known as the goods of a particular trader, whether such name be the name of the trader himself (r) or a fancy word (s), or a descriptive term, no other person has the right to use that name *so as to represent that he is selling the goods of that trader*.

(m) [1918] A. C., at p. 713, and see *Swift v. Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56.

(n) *Williams v. Mason*, 28 L. T. 232.

(o) *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560; 70 L. J. K. B. 282.

(p) *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C., at p. 538; 35 L. J. Ch. 53.

(q) *Reddaway v. Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381.

(r) See *Singer Manufacturing Co. v. Loog*, 8 A. C., at pp. 33, 38; 52 L. J. Ch. 481; *W. H. Dorman & Co. v. Henry Meadows, Ltd.*, [1922] 2 Ch. 332; 91 L. J. Ch. 796.

(s) See, e.g., *The Birmingham Vinegar Brewery Co., Ltd. v. Powell*, [1897] A. C. 710; 66 L. J. Ch. 763 (Yorkshire Relish); see also *Cellular Clothing Co. v. Marton and Murray*, [1899] A. C., at p. 339; 68 L. J. P. C. 72.

Thus, in *Reddaway v. Banham* (t), the plaintiff had for some years sold belting described as "Camel Hair Belting", and that name had come to mean in the trade the plaintiff's belting only. The defendant began to sell belting, made of camel hair, which he stamped "Camel Hair Belting". *Held*, that the plaintiff was entitled to an injunction to restrain the defendant from using the words "Camel Hair" as descriptive of his belting, without clearly distinguishing such belting from that made by the plaintiff.

This general rule is, however, subject to two qualifications.

In the first place a purely descriptive name, such as "cellular", does not come within the rule unless it has acquired a secondary or special meaning so as to denote only the goods of one particular trader (u).

Secondly, a name which originally denoted the goods of a particular trader may have lost its primary meaning, and may have come to denote goods merely of a particular kind, character and quality, in which case it may be used by anyone who makes goods of that kind, character or quality. The test as to whether a name has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public, and to induce the public to buy goods not made by the person originally using the name, as if they were his goods (x).

Thus, in *Singer Manufacturing Co. v. Loog*, it was held that the name "Singer" as applied to sewing machines was no longer the designation of machines made by the plaintiff, but had become the designation merely of machines of a particular type and might be used by the defendant in advertising his own machines (e.g., as "our Singer machines") provided that he did so in such a way as to avoid any reasonable possibility of misunderstanding or deception (y).

Moreover, a man may not use his own name in such a way as to represent that the goods which he is selling are the goods of another person, or that the business which he is carrying on is the business of another (z). But "the Court cannot stop a man from carrying on his business in his own name, although it may be the name of a better-known manufacturer, when he does

(t) *Ubi supra*.

(u) *Cellular Clothing Co. v. Marton and Murray* (*ubi supra*), distinguishing *Reddaway v. Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381.

(x) *Ford v. Foster*, L. R. 7 Ch. 611; 41 L. J. Ch. 682.

(y) 8 A. C. 15; 52 L. J. Ch. 481. Compare *Havana, etc., Factories v. Oddenino*, [1924] 1 Ch. 179; 93 L. J. Ch. 81 (where the question was whether the term "Corona", which had been used for many years by the plaintiffs and their predecessors, still applied only to cigars of the plaintiffs' brand or had come to mean a cigar of a particular size and shape).

(z) See, for example, *Tussaud v. Tussaud*, 44 Ch. D. 678; 59 L. J. Ch. 631 (reviewing the earlier authorities).

nothing at all in any way to try and represent that he is that better-known and successful manufacturer" (a).

Where, however, the defendant had *assumed* a name for the purpose of passing off his boots and shoes as of the plaintiff, he was restrained absolutely from using the name in connection with the sale or manufacture of boots or shoes (b).

Where, on the other hand, the defendant had, without any intention to deceive, used for many years an assumed name as an employee of a company, and had acquired that name by reputation, it was held that, in subsequently carrying on business on her own account she was entitled to use that name, although some confusion might possibly arise through its similarity to the name of another firm carrying on business in the same trade but in a different town and a different class of trade (c).

Lastly, apart from the user of any trade name, one person may not imitate the appearance or get-up of another person's goods in manner calculated to deceive and to lead to his goods being passed off on those who wish to buy the goods of that other person (d).

In all passing-off actions the issue is a simple question of fact, namely, whether the defendant has sold his goods so as to represent them as being the goods of the plaintiff (e). If this is the case the plaintiff can obtain an injunction without proving any intent to deceive on the part of the defendant (f), or that any one was in fact deceived (g). And if the defendant has acted with the intention of deceiving purchasers and of inducing them to believe that his goods are the goods of another the plaintiff can recover damages and is entitled to nominal damages even though no special damage is proved (h).

(a) *Turton v. Turton*, 42 Ch. D., at p. 143.

(b) *Pinet & Co., Ltd. v. Maison Louis Pinet*, [1898] 1 Ch. 179; 67 L. J. Ch. 41.

(c) *Jay's, Ltd. v. Jacobi*, [1933] 1 Ch. 411; 102 L. J. Ch. 130. The defendant had been known as Miss Jay and started business in Hove under the name "Jays".

(d) See *Edge & Sons, Ltd. v. William Nicolls & Sons, Ltd.*, [1911] A. C. 698; 80 L. J. Ch. 744.

(e) See *Turton v. Turton* (ubi supra); *Birmingham, etc., Brewery Co. v. Powell* (ubi supra); *Cellular Clothing Co. v. Maxton and Murray* (ubi supra).

(f) *Turton v. Turton* (ubi supra); *Cellular Clothing Co. v. Maxton and Murray* (ubi supra).

(g) *Johnston v. Orr-Ewing*, 7 A. C. 219; 51 L. J. Ch. 797; *Singer Manufacturing Co. v. Loog* (ubi supra).

(h) *Singer Manufacturing Co. v. Loog* (ubi supra); *Reddaway v. Bentham, etc., Co.*, [1892] 2 Q. B. 639.

## CHAPTER VIII

## DEFAMATION AND OTHER ACTIONABLE LANGUAGE

SECTION 1.—*Defamation*

DEFAMATION consists in the publication, without justification or excuse, of that which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule (*a*). If the publication is by writing, printing, pictures, effigies (*b*), or in any other permanent form, it is a *libel*; if by words only, it is a *slander*: libel is both a civil wrong and a criminal offence, slander is only a civil wrong (*c*): in a libel it is not necessary for the plaintiff to prove that he has suffered any special damage, but in slander, with some exceptions, proof of some special damage is necessary (*d*).

The *plaintiff* in an action of defamation must prove

1. That the matter of which he complains was published by the defendant; and
2. That it was published of and concerning him; and
3. That it is defamatory in character; and
4. In slander, subject to certain exceptions, that he has thereby suffered special damage.

Defamation is *prima facie* unjustifiable, so that the plaintiff need not in the first instance prove any malice in fact; but if the defendant sets up a plea of *qualified* privilege or fair comment,

(*a*) *Parmitter v. Coupland*, 6 M. & W., at p. 108; 9 L. J. Ex. 202; 55 B. R. 529. In *Sim v. Stretch*, 52 T. L. R. 669, it was suggested by Lord Atkin that this may be too narrow because the question is complicated by having to consider the person, or class of persons, whose reaction to the publication is the test of the wrongful character of the words used. Apparently, therefore, the question is whether the words would lower the plaintiff in the estimation of his fellows, who, in the absence of special circumstances, are "right thinking members of society generally".

(*b*) See *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671; 63 L. J. Q. B. 454.

(*c*) For the historical reasons for this distinction, see *Jones v. Jones*, [1916] 2 A. C., at pp. 489, 490; 85 L. J. K. B. 1519. But spoken words, though not criminal merely because defamatory, may be punishable criminally as being seditious, blasphemous or obscene, or a contempt of Court, or a solicitation to commit a crime.

(*d*) See *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; *Jones v. Jones* (*ubi supra*).

the plaintiff may in answer prove the existence of malice in fact (e).

1. *Publication by the defendant.*—The plaintiff must prove publication to a third party (f). Communication by the defendant to his wife is not publication, because for this purpose husband and wife are one (g); but communication by the defendant to the plaintiff's wife is a publication (h).

The contents of a telegram (i) or postcard (k) are published to the clerks and postmen who see it while it is passing through their hands. So also, the contents of a letter are published to a clerk of the defendant to whom they are dictated, and to a clerk of the plaintiff by whom they are read in the ordinary course of business.

Thus, in the case of *Pullman v. Hill & Co.*, the defendants' managing director dictated a letter to a clerk, who took it down in shorthand, typed it out in full upon a typewriter and gave it to an office boy to copy in a press: when the letter reached its destination it was opened by one of the plaintiff's clerks and read by two other clerks: it was accordingly held that there was a publication, both to the plaintiff's servants and to the defendants' servants (l).

But there is no publication where a letter is opened and read by a person by whom the defendant has no reason to believe that it will be read, as, *e.g.*, where an unsealed letter is opened and read by a servant out of curiosity (m) or where a letter addressed to one person is opened and read by another who had no right to do so (n).

(e) See *ante*, p. 253. "If A utters a slander of B, even if he be a stranger to him, the averment that A maliciously spoke such words of B is established by simply proving the uttering of words taken to be false until the contrary appears. In such an action, the word 'maliciously' may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed" (*South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C., at p. 250; 74 L. J. K. B. 525).

(f) In criminal proceedings publication to the prosecutor is sufficient, the essence of the criminal offence being its tendency to cause a breach of the peace: *R. v. Adams*, 22 Q. B. D. 66; 58 L. J. M. C. 1.

(g) *Wrenhak v. Morgan*, 20 Q. B. D. 635; 57 L. J. Q. B. 211.

(h) *Wenman v. Ash*, 13 C. B. 836; 22 L. J. C. P. 190.

(i) *Williamson v. Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161.

(k) *Sadgrove v. Holt*, [1901] 2 K. B. 1; 70 L. J. K. B. 455.

(l) [1891] 1 Q. B. 521; 60 L. J. Q. B. 299.

(m) *Huth v. Huth*, [1915] 3 K. B. 32; 84 L. J. K. B. 1807. In this case the libel was enclosed in an unsealed envelope bearing a halfpenny stamp, and it was argued without success, that this ought to be treated as a postcard. But it was suggested that there would have been publication if the letter had been opened by a Post Office servant in the course of his duty, in order to see whether the letter could properly go through the post with a halfpenny stamp.

(n) *Powell v. Gelston*, [1916] 2 K. B. 615; 85 L. J. K. B. 1783.

A person who publishes a libel or slander is, in general, liable to an action, even if he does so innocently and without negligence (o) or by mistake.

Thus, in *Shepherd v. Whitaker* (p), the defendants by mistake inserted the names of the plaintiff's firm under the head "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnerships". The plaintiffs brought an action alleging by way of innuendo (see *post*, p. 431) that this meant that they had become bankrupt or had taken proceedings in liquidation or for composition. The jury found for the plaintiffs and the Court refused to disturb the finding.

But a person who is not the first or main publisher of a work containing a libel, and has only taken a subordinate part in disseminating it in the ordinary course of his business (*e.g.*, as a newsvendor or proprietor of a library), is not liable if he shows (i) that he is innocent of any knowledge of the libel contained in the work, and (ii) that there was nothing in the work or the circumstances in which it came to him or was disseminated by him, which ought to have led him to suppose that it contained a libel, and (iii) that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel: if these facts are proved, he may be held not to have published it (q).

Subject to this exception, all persons are equally liable who, either themselves or by their servants or agents, are concerned in the publication of a libel. Thus, if a libel is contained in a newspaper, not only the contributor (r), but the proprietor of the newspaper and the printer (s) are all liable; so also is the seller of a newspaper or other work, unless he can prove, as above stated, that the dissemination of the work was innocent and without negligence (t).

Every sale of a work containing a libel is a new publication, so that the sale of a copy of a newspaper published more than seventeen years previously creates a fresh cause of action (u).

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(o) *Vizetelly v. Mudie's Library*, [1900] 2 Q. B., at p. 179; 69 L. J. Q. B. 645.

(p) L. R. 10 C. P. 502.

(q) *Vizetelly v. Mudie's Library*, [1900] 2 Q. B., at p. 180, following *Emmens v. Pottle*, 16 Q. B. D. 354; 55 L. J. Q. B. 51. So also a porter who merely delivers a parcel containing libellous handbills is not liable if he was ignorant of their contents: *Day v. Bream*, 2 M. & Rob. 54.

(r) *Bond v. Douglas*, 7 C. & P. 626; *Brown v. Croome*, 2 Stark, 297.

(s) *Emmens v. Pottle*, 16 Q. B. D., at p. 357; 55 L. J. Q. B. 51.

(t) See *Vizetelly v. Mudie's Library* (*ubi supra*).

(u) *Duke of Brunswick v. Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20

But a defendant is liable only for his own acts and those of his servants or agents or persons who, as he knows and intends, will repeat the libel (*x*), and not for unauthorised publications or repetitions by third persons (*y*). Accordingly, where a person, without authority, repeats a defamatory statement he alone is usually liable in respect of that repetition (*z*), and it is no defence that he is only repeating a general rumour (*a*). The original publisher and not the repeater is, however, liable when the first publication was made to a person who was under a moral obligation to repeat it (*b*).

2. *Of and concerning the plaintiff*.—The plaintiff must prove that the defamatory matter (i) refers, and (ii) was intended to refer, to himself (*c*); *i.e.*—

- i. That the matter published is such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers (*d*).
- ii. That the publisher of the libel intended to refer to him. But a person publishing a libel is deemed to intend the natural meaning of his own words: "the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances (*e*) . . . the question is whether [they] would be understood by readers to apply to a particular person" (*f*).

Accordingly, if a person publishes a libel apparently intended to refer to a real person, he is liable if his language does in fact refer to and hit some individual, although he had no knowledge of that particular individual. "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both" (*g*).

(*x*) *Whitney v. Mognard*, 24 Q. B. D., at p. 681; 59 I. J. Q. B. 824.

(*y*) See *Pullman v. Hill & Co.*, [1891] 1 Q. B., at p. 527; 60 L. J. Q. B. 299.

(*z*) *Ward v. Weeks*, 7 Bing. 211; 9 L. J. (o.s.) C. P. 6. And he may be liable when the original publisher was not liable, *e.g.*, if the first publication was on a privileged occasion: see *McPherson v. Daniels*, 10 B. & C., at p. 278; 8 L. J. (o.s.) K. B. 14; 34 R. R. 397.

(*a*) *Watkin v. Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 123.

(*b*) *Derry v. Handley*, 16 I. T. 263.

(*c*) *Jones v. Hulton & Co.*, [1909] 2 K. B. 144; 78 L. J. K. B. 987; affirmed. [1910] A. C. 20; 79 L. J. K. B. 198.

(*d*) [1909] 2 K. B., at p. 477.

(*e*) [1909] 2 K. B., at p. 180.

(*f*) [1909] 2 K. B., at p. 453.

(*g*) *Hulton & Co. v. Jones*, [1910] A. C., at p. 23.

Thus, in the case of *Hulton & Co. v. Jones (g)*, the defendant, the proprietor and publisher of a newspaper, published an article purporting to describe what the Paris correspondent of the paper had actually seen at Dieppe, and containing these words: "' Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing' whispers a fair neighbour of mine excitedly in her bosom friend's ear: 'Really is it not surprising how certain of our fellow-countrymen behave when they come abroad.'" An action for libel was accordingly brought by Mr Artemus Jones, a barrister, and evidence was given by his friends that they thought the article referred to him. It was held that, since the words "Artemus Jones" were used as descriptive of a real person, the plaintiff was entitled to succeed, and that it was no answer for the defendant to say that he did not intend to describe the plaintiff, because he had never heard of him: "he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby" (h).

And, in such a case it is no defence that the words complained of were in fact published of another existing person of the same name and description as the plaintiff and that, in relation to that other person, they were true.

Thus, in *Newstead v. London Express Newspapers, Ltd. (i)*, the defendants had published a statement to the effect that "Harold Newstead, thirty-year-old Camberwell man" had been convicted of bigamy. The plaintiff's case was that he was well known in the hairdressing trade in Camberwell and elsewhere as Harold Newstead, and that he was about thirty years of age and was a Camberwell man. It was held that it was no defence that the words were published of another existing person of that name and description, and that they were intended and understood to refer to him and were true of him.

Where the plaintiff is not named the question, which is one of law, is whether the words used would reasonably lead persons acquainted with him to believe that he is the person referred to. A defamatory statement made of a firm, or trustees, or tenants of a particular building may reasonably be understood as referring to each (j). So, in *Le Fanu v. Malcolmson (k)*, it was held that the verdict of a jury awarding damages to the owners of a factory in the county Waterford against the proprietors of a newspaper in that county would be upheld though no specific reference was made to that factory, there being circumstances which enabled the jury to identify it as being referred to. But an article in a newspaper making allegations about a body of persons some thousands in number, established in many countries and making no reference to

(h) *Jones v. Hulton & Co.*, [1909] 2 K. B., at p. 481.

(i) [1940] 1 K. B. 377; 109 L. J. K. B. 166.

(j) *Knuppfer v. London Express Newspapers, Ltd.*, [1941] A. C. 116; 113 L. J. K. B. 251.

(k) 1 H. L. C. 367.



the plaintiff or even to England, nor enabling anyone to identify any person as a member of that body cannot give a cause of action to a member resident in England (*j*).

3. *Of defamatory matter*.—The matter which is charged as libellous must be “calculated to bring the plaintiff into hatred, contempt or ridicule” (*l*). The imputation need not be made directly or by any express assertion; it may be conveyed indirectly by any form of insinuation, as by ironical praise or figurative language, or by caricature or effigy, provided that the matter complained of is “susceptible of a libellous meaning in this sense, that a reasonable man could construe [it] unfavourably in such a sense as to make some imputation upon the person complaining” (*m*). But words merely conveying suspicion are not sufficient (*n*), nor is it enough that by some person or another the words might be understood in a defamatory sense (*o*).

And there must be an imputation upon the *plaintiff*: thus, in a case where the defendant published an article in which he described the plaintiff's newspaper as the “Market Street Evening Ananias”, it was held that those words did not necessarily convey any imputation upon the plaintiff's character in his conduct of his newspaper, and that the jury could reasonably decide that they were not defamatory of the plaintiff (*p*). It is, however, in each case a question for the jury whether there is in fact an imputation on the plaintiff personally (*p*), and a statement with regard to his goods may amount to such an imputation if it imports a reflection on the character of his business (*q*) or on his honesty or capacity in carrying on his business (*r*). Moreover, words published about another person may indirectly be defamatory of the plaintiff: thus, to say that a man is illegitimate may be defamatory of his parents, and to say that a man is a bachelor may be defamatory of a woman who passes as his wife (*s*).

(*l*) *Neuill v. Fine Arts, etc., Insurance Co.*, [1897] A. C., at p. 72; 66 L. J. Q. B. 195.

(*m*) [1897] A. C., at p. 76.

(*n*) *Simmons v. Mitchell*, 6 A. C. 156; 50 L. J. P. C. 11.

(*o*) *Neuill v. Fine Arts, etc., Insurance Co.*, [1897] A. C., at p. 73.

(*p*) *Australian Newspaper Co. v. Bennett*, [1891] A. C. 284; 63 L. J. P. C. 105.

(*q*) *South Hutton Coal Co. v. North Eastern News Association*, [1891] 1 Q. B., at p. 139; 63 L. J. Q. B. 293.

(*r*) *Ingram v. Larson*, 6 Bing. N. C. 212; 9 L. J. C. P. 145; 54 R. R. 766; *Beadle v. United Kingdom Alliance*, 31 T. L. R. 403.

(*s*) *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B., at pp. 338, 339; 98 L. J. K. B. 595. So, also, to say that a woman is the wife of A may be defamatory of the real wife of A: *Hough v. London Express Newspaper, Ltd.*, post, p. 431.

Where defamatory words are spoken of a *class* of persons, a member of that class cannot bring an action unless either (i) the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, or (ii) although the words purport to refer to a class, yet in the circumstances of the particular case they in fact refer to one or more particular persons (t).

"If there is a controversy as to whether the words used are defamatory or not, it is for the Judge to determine whether they are capable of a defamatory meaning, and, that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not" (u).

Where nothing is alleged which would give the words any extended meaning they must be construed in the meaning which they "would be understood by ordinary persons to bear" (w). But the plaintiff may allege that there were special circumstances known to the persons to whom the matter complained of was published that might lead them to understand it in a defamatory sense (y), or even that it was published in circumstances that led "ordinary citizens" to attach to it a defamatory meaning (a).

In such case the plaintiff must insert in his pleading an *innuendo*, setting out the special meaning intended by the statement, and must prove the circumstances which caused it to bear that meaning: it is then for the Court to say whether the statement is capable of the meaning alleged and whether such meaning is capable of being defamatory, but for the jury to say whether in the circumstances it did bear that meaning and was defamatory of the plaintiff (b). And, as already pointed out, in ascertaining what was meant by the statement, the question to be considered is what was meant by the words employed, not what was meant in the mind of the speaker or publisher (c). Nor is it possible for the defendant to excuse himself by saying that

(t) *Knuppyer v. London Express Newspaper, Ltd.*, [1943] 1 K. B. 80.

(u) *Adam v. Ward*, [1917] A. C., at p. 329; 86 L. J. K. B. 849.

(x) *Capital and Counties Bank v. Henty*, 7 A. C., at p. 772; 52 L. J. Q. B. 232; *Tolley v. J. S. Fry & Sons, Ltd.*, [1931] A. C. 338.

(y) *Cassidy v. Daily Mirror Newspapers (infra)*. It is not necessary to call any persons to say that they did so understand the words, provided that it is proved that there are people who might so understand them: *Hough v. London Express Newspaper, Ltd.*, [1940] 2 K. B. 507; 109 L. J. K. B. 524.

(a) *Tolley v. J. S. Fry & Sons, Ltd. (infra)*.

(b) *Bullen & Leake* (3rd ed.), p. 305; *Capital and Counties Bank v. Henty*, 7 A. C. 741.

(c) *Ante*, p. 128; and see *Hulton & Co. v. Jones*, [1910] A. C., at pp. 26, 20.

he was unaware of the special circumstances causing the statement to bear a defamatory meaning (d). These principles are illustrated by the following cases.

In *Cassidy v. Daily Mirror Newspapers, Ltd.* (e), the plaintiff was the wife of C., a well-known racehorse owner. She did not live with him but was generally known as his wife, and he occasionally stayed at her flat and there met her friends. The defendants published in their newspaper a photograph of C. and a Miss X, with the inscription, "Mr. C., the racehorse owner, and Miss X, whose engagement has been announced". The plaintiff brought an action for libel, setting out these facts and words with an innuendo alleging that they meant she was an immoral woman who had cohabited with C. without being married to him. At the trial she called three of her friends, who gave evidence that, on seeing the publication, they understood from it that she was not married to C. It was held that the words were capable of bearing to the persons to whom they were published the meaning that C. was unmarried and hence were capable of bearing a meaning defamatory of the plaintiff, but that whether in the circumstances, they were in fact defamatory of the plaintiff was a question for the jury.

In *Tolley v. J. S. Fry & Sons, Ltd.* (f), the defendants, without the consent of the plaintiff, who was a well-known amateur golfer, published an advertisement containing a caricature of him in golfing costume, with a packet of their chocolate protruding from his pocket; below the caricature was a limerick, containing the plaintiff's name and comparing the excellence of his play with the merits of the chocolate. The plaintiff brought an action for libel, alleging by an innuendo that the defendants meant and were understood to mean (*inter alia*) that he had agreed or permitted his portrait to be exhibited for the purpose of advertising the defendants' chocolate, and that he had in consequence been guilty of conduct unworthy of his status as an amateur. At the trial, evidence, which was not contradicted, was given that, if an amateur golfer lent himself to an advertising scheme, his reputation would be seriously damaged and his status as an amateur would be endangered. It was held that, in view of the publication of the matter complained of as part of an advertisement, it was not possible to say that the ordinary man or woman might not reasonably draw the inference that it was published

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(d) *Cassidy v. Daily Mirror Newspapers* (*infra*).

(e) [1929] 2 K. B. 331; 98 L. J. K. B. 595.

(f) [1931] A. C. 333; 47 T. L. R. 351.

with the assent of the plaintiff, and, since there was evidence that such an inference might be harmful to the plaintiff's position as an amateur golfer, the trial Judge was right in allowing the case to go to the jury.

In *Hough v. London Express Newspaper, Ltd.* (g), the defendants published an article in which they described a woman who was not the wife of a professional boxer as his "curly headed wife" who saw all his fights. His wife accordingly brought an action for libel, alleging by an innuendo that these words meant and were understood to mean that she was a dishonest woman falsely representing herself to be and passing as the wife of the boxer, and that she was an unmarried woman who had cohabited with and had children by the boxer without being married to him. It was held, following *Cassidy v. Daily Mirror Newspapers, Ltd.*, that she was entitled to succeed in her action because people who knew that she passed as the wife of the boxer might reasonably be led by the article in the newspaper to put upon it the construction set out in the innuendo.

4. *Damage*.—In libel damage is presumed (h); a plaintiff may therefore recover general damages without proving that he has in fact suffered any actual damage, and the fact that he had a bad reputation which could not be made worse is no answer to the action. But the defendant may, in mitigation of damages, prove the bad general reputation of the plaintiff, who may rebut this evidence by "coming prepared with friends who have known him to prove that his reputation has been good" (h). Slander, on the other hand, is actionable only if either (i) special damage is proved; or (ii) the imputation is such and the state of facts proved is such as that the law presumes or infers damage; or (iii) the case falls within the Slander of Women Act, 1891 (i). By the *Slander of Women Act*, 1891, it is provided that "Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable: Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the Judge shall certify that there was reasonable ground for bringing the action".

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(g) [1940] 2 K. B. 507; 109 L. J. K. B. 524.

(h) *Hobbs v. Tinsling & Co.*, [1929] 2 K. B., at p. 17; 98 L. J. K. B. 421; 141 L. T. 121; 45 T. L. R. 328.

(i) *Jones v. Jones*, [1916] 2 A. C., at pp. 500, 506; 32 T. L. R. 705.

Apart from this Act, there are only three cases in which the law presumes damage (*k*), namely :—

- i. When the words spoken impute a crime punishable with imprisonment (*l*);
- ii. When they impute certain diseases naturally excluding the patient from social intercourse (*m*);
- iii. When words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling (*n*).

In the first class of cases it is not sufficient that the words impute an offence punishable by fine, though involving liability to summary arrest (*o*). But it is not necessary that they should impute an indictable offence nor that they should specify any particular crime (*p*): thus, the words "I will have you hanged" have been held sufficient (*q*). In all cases, however, the question is what "reasonable men, hearing the words, would understand by them", and therefore even the use of a word such as "thief" may not be actionable without proof of special damage if the person to whom it was said knew that it was used simply as vulgar abuse and not as imputing a felony (*r*).

In the second class of cases the words must impute the present existence of such a disease, it is not sufficient if the allegation is that the plaintiff suffered from it at some previous time (*s*).

In the last class damage is presumed if the words impute to the plaintiff some impropriety or misconduct in relation to or in connection with his office, profession, or trade, or, *except in the case of an honorary office*, some unfitness or incapacity for that office, profession, or trade, as, *e.g.*, an imputation of dishonesty where the office is one of trust (*t*).

"Where the imputation is an imputation not of misconduct

(*k*) See *Jones v. Jones*, [1916] 2 A. C., at pp. 500, 507; 85 L. J. K. B. 1519.

(*l*) The crime must be one which it was possible for the plaintiff to commit: *Jackson v. Adams*, 2 Bing. N. C. 402; 5 L. J. C. P. 79.

(*m*) See *Bloodworth v. Gray*, 7 Man. & G. 384; 66 R. R. 720.

(*n*) In this case the term "person" includes a limited company; *D. & L. Caterers, Ltd. and Jackson v. D'Ajou*, [1943] 1 K. B. 384; 114 L. J. K. B. 366.

(*o*) *Hellwig v. Mitchell*, [1910] 1 K. B. 609; 79 L. J. K. B. 270.

(*p*) *Webb v. Beavan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544.

(*q*) *Francis v. Roose*, 3 M. & W. 191; 7 L. J. Ex. 66; 49 R. R. 567.

(*r*) *Hankinson v. Bilby*, 2 C. & K. 410; 73 R. R. 563.

(*s*) *Carslake v. Mapledoram*, 2 T. R. 473.

(*t*) *Alexander v. Jenkins*, [1892] 1 Q. B. D. 797; 61 L. J. Q. B. 634; *Booth v. Arnold*, [1893] 1 Q. B. 571; 61 L. J. Q. B. 443; *Jones v. Jones*, [1916] 2 A. C. 161, at p. 508; 85 L. J. K. B. 1519.

in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie unless the conduct alleged be such as would enable him to be removed from or deprived of that office (u).

Thus, in *Alexander v. Jenkins* (x), it was held that without proof of special damage no action lay for alleging of a town councillor that "he is never sober and is not a fit man for the council".

And subject to two exceptions to be mentioned later, the words must be expressly spoken of and concerning the plaintiff in his profession, trade or calling (y). "Words imputing adultery, profligacy, immoral conduct, or the like, whether referring to behaviour on a particular occasion, or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties" (z).

So, in *Jones v. Jones* (a), it was held that in the absence of special damage an action will not lie for words imputing adultery to a schoolmaster, unless spoken in reference to him as a schoolmaster.

But (i) an imputation of insolvency to a trader need not be expressly spoken of him in relation to his business, because the Court will presume that it is directed against and will affect his credit as a trader (b); and (ii) the same rule applies to a charge of misconduct which might cause a clergyman to be deprived of a benefice or to lose an ecclesiastical position of temporal profit (c).

**Special Defences (d).—**The defendant may, in answer—

1. Justify the libel or slander; *i.e.*, set up that it is true;

(u) [1892] 1 Q. B., at p. 202.

(x) *Ubi supra*.

(y) *Jones v. Jones*, [1916] 2 A. C., at pp. 491, 495; 85 L. J. K. B. 1519.

(z) *Jones v. Jones*, [1916] 2 A. C., at p. 499; 85 L. J. K. B. 1519.

(a) *Ubi supra*. See also *Hopwood v. Muirson*, [1945] K. B. 818; 114 L. J. K. B. 267.

(b) [1916] 2 A. C., at pp. 491, 507.

(c) [1916] 2 A. C., at pp. 491, 492, 508. But not if he is unbeneficed or without any other preferments. *Ibid.*, and see *Gallwey v. Marshall*, 9 Ex. 294; 28 L. J. Ex. 78; 96 R. R. 721; *Wakeford v. Wright*, 39 T. L. R. 107.

(d) For general defences, see *ante*, p. 267. For accord and satisfaction as a defence, see *Boosey v. Wood*, 3 H. & C. 484; 84 L. J. Ex. 65; 140 R. R. 565.

2. Allege that the matter complained of was fair comment on a matter of public interest;

3. Allege that the publication was privileged;

4. In case of a libel contained in a newspaper, set up the statutory defence under s. 2 of Lord Campbell's Libel Act, 1843.

1. *Justification*.—In civil proceedings the truth of a libel or slander is an absolute defence (e).

Upon a plea of justification, the defendant must prove to the satisfaction of the jury that the whole libel is true in substance and in fact, not only in its allegations of fact, but also in any comments or expressions of opinion (f). "In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true" (g).

Any matter which is not of the gist or "sting" of the libel need not be justified; the defendant need not therefore separately justify mere details or epithets which are contained in the imputation but which add nothing to the substantive charge (h).

But the defendant must justify every material imputation upon the plaintiff (i), and, if the charge is general in its nature, must state in his pleading the facts upon which he relies as supporting his plea of justification (k).

Where a libel contains several distinct charges the defendant may justify part of it (l). And, where there is an innuendo, the defendant may plead a justification as to the words with the meaning in the innuendo and also as to them without that meaning (m).

(e) In criminal proceedings, the truth of a libel is not a defence unless it was for the public benefit that it should be published: Libel Act, 1843, s. 6.

(f) See *Sutherland v. Stopes*, [1925] A. C. 47; 94 L. J. K. B. 166, where the plea of justification is very fully discussed.

(g) [1925] A. C., at p. 75.

(h) *Alexander v. North Eastern Ry.*, 6 B. & S. 340; 34 L. J. Q. B. 125; 141 R. R. 432; *Sutherland v. Stopes*, [1925] A. C., at pp. 59, 60. See also *Clarke v. Taylor*, 2 Bing. N. C. 654; 5 L. J. C. P. 235.

(i) *Smith v. Parker*, 13 M. & W. 459; 14 L. J. Ex. 52; *Helsham v. Blackwood*, 11 C. B. 111; 20 L. J. C. P. 187; 87 R. R. 596.

(k) *Zierenberg v. Labouchere*, [1898] 2 Q. B. 183; 63 L. J. Q. B. 89.

(l) *Clarke v. Taylor*, 2 Bing. N. C., at p. 664; *Sutherland v. Stopes*, [1925] A. C., at p. 78.

(m) *Watkin v. Hall*, L. R. 3 Q. B., at p. 402; 37 L. J. Q. B. 125; *Sim v. Stretch*, 52 T. L. R. 689.

The fact that the plaintiff has a bad reputation is no justification and cannot be pleaded as a defence, though it may be relevant in mitigation of damages (n).

2. *Fair comment*.—The defence of fair comment which does not arise if the plea of justification is made good (o), is that the alleged libel is a *bona fide* criticism upon a matter of public interest. To establish this defence the defendant must show—

- i. That the matter commented upon was of *public interest*. This expression includes all State matters, the administration of justice, the public conduct of men engaged in public affairs, the management of public institutions, artistic and literary productions and dramatic performances. Whether or not a matter is of public interest is for the Judge to decide (p).
- ii. That the matter complained of was *criticism*, i.e., an expression of opinion on existing facts. This involves three propositions (q). In the first place it must be comment as distinct from an allegation of fact; thus "it is one thing to *comment* on . . . the acknowledged or proved acts of a public man and quite another to *assert* that he has been guilty of particular acts of misconduct" (r). In the second place the facts must be truly stated: "If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails" (s). In the third place the comment must not contain any imputation on the plaintiff's moral character which is not warranted by the facts: "if a criticism . . . includes such an imputation, *there being no facts to warrant it*, it is open to the jury to find . . . that the defence of 'fair comment' has no application" (t). But the defence of fair comment extends to such an imputation

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(n) *Wood v. Durham (Earl)*, 57 L. J. Q. B. 547; *Hobbs v. Tinsling & Co.* (ante, p. 433).

(o) *Dakhyl v. Labouchere*, [1908] 2 K. B., at p. 327; 77 L. J. K. B. 728; *Sutherland v. Stopes* (ubi supra).

(p) *Campbell v. Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 129 R. R. 552; *Mervale v. Carson*, 20 Q. B. D. 275.

(q) *Hunt v. Star Newspaper Co.*, [1908] 2 K. B., at pp. 319-321; 77 L. J. K. B. 732.

(r) *Davis v. Shepstone*, 11 A. C., at p. 190; 55 L. J. P. C. 51.

(s) [1908] 2 K. B., at p. 320.

(t) *Id.*, and see *Campbell v. Spottiswoode* (ubi supra), and *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B., at p. 298; 73 L. J. K. B. 752.



if the comment is the honest expression of the well-founded opinion of the writer based upon those facts (u).

- iii. That the criticism is *fair comment*. This does not mean that the comment must be a *correct* criticism (x), but that the mode of expression must be fair and the opinion honestly held. The jury have no right to substitute their own opinion for that of the critic (y); the question which they must consider is this—"Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?" (z).

But "proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege" (a).

8. *Privilege*.—The publication of defamatory matter may be protected because it was made upon a *privileged occasion*. The privilege may be either (i) *absolute*, when the existence of malice in fact is immaterial (b), or (ii) *qualified*, when it may be rebutted by proof of express malice. It is for the Judge, and the Judge alone, to decide as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury (c).

*Absolute privilege* exists in the case of—

- i. Statements in Parliament (d).
- ii. Reports and papers published by order of either House of Parliament (e).

(u) *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309; *Dakhyl v. Labouchere*, [1908] 2 K. B., at p. 325 (n.); 77 L. J. K. B. 728. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the Judge, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn. In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts: [1908] 2 K. B., at pp. 320, 321.

(x) See *Sutherland v. Stopes*, [1925] A. C., at p. 62.

(y) *McQuire v. Western Morning News*, [1903] 2 K. B., at p. 109; 72 L. J. K. B. 612.

(z) *Merivale v. Carson*, 20 Q. B. D., at p. 281.

(a) *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B., at p. 640; 75 L. J. K. B. 726.

(b) See *Royal Aquarium, etc., Society v. Parkinson*, [1892] 1 Q. B., at p. 451; 61 L. J. Q. B. 409.

(c) *Adam v. Ward*, [1917] A. C., at p. 318; 86 L. J. K. B. 849.

(d) [1917] A. C., at pp. 324, 345.

(e) Parliamentary Papers Act, 1840, ss. 1, 2.

- iii. Affairs of State, *e.g.*, advice tendered to the Crown by its ministers (f), publications in the "Gazette" by a Secretary of State (g) and communications made by one officer of State to another in the course of his official duty (h).
- iv. Statements made in the course of judicial proceedings, and, perhaps, newspaper reports of such proceedings if within s. 8 of the *Law of Libel Amendment Act*, 1888 (i).

"No action of libel or slander lies, whether against Judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse and from personal ill-will and anger against the person defamed" (k).

This privilege extends only to proceedings in "Courts of justice and tribunals acting in a manner similar to that in which such Courts act"; it does not attach to the proceedings before every body which is bound to decide matters "judicially" in the sense of dealing fairly and impartially (l). Thus, it applies to proceedings before a Coroner's Court (m), before a military court of inquiry (n), before a Select Committee of the House of Commons (which has power to enforce the giving of evidence) (o), before the Disciplinary Committee of the Law Society (p), and before a justice of the peace on a petition for an order

(f) *Dawkins v. Lord Paulet*, L. R. 5 Q. B., at p. 117; 39 L. J. Q. B. 53; 9 B. & S. 768.

(g) *Grant v. Secretary of State for India*, 2 C. P. D., at p. 453; 46 L. J. C. P. 681.

(h) *Chatterton v. Secretary of State for India*, [1895] 2 Q. B. 189, at p. 195; 64 L. J. Q. B. 676; *Isaacs & Sons, Ltd v. Cook*, [1925] 2 K. B. 391; 94 L. J. K. B. 886. See also *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, where the principle was applied to reports made by an officer of the Army to his superior officer.

(i) See *post*, p. 441.

(k) *Royal Aquarium, etc., Society v. Parkinson* (*ubi supra*); and see *ante*, p. 269. The privilege extends to statements made for the purpose of preparing proofs for use in such proceedings (*Watson v. McEwan*, [1905] A. C., at p. 487; 74 L. J. P. C. 151).

(l) *Royal Aquarium, etc., Society v. Parkinson*, [1892] 1 Q. B., at p. 442.

(m) *Thomas v. Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139.

(n) *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 38 L. T. 196.

(o) *Goffin v. Donnelly*, 6 Q. B. D. 307; 50 L. J. Q. B. 803; 44 L. T. 141.

(p) *Lilley v. Roney*, 61 L. J. Q. B. 727.

for the reception of a lunatic (q). It applies also to reports made by officers of a Court in the course of their duty, e.g., to the report of an official receiver made in the winding up of a company (r).

But it does not apply to proceedings before a meeting of the London County Council for granting music and dancing licences (s), nor to proceedings before licensing justices (t).

- v. Confidential communications between solicitor and client made while that relationship is in existence or in contemplation and for the purpose of getting or giving professional advice, that is to say, advice in respect of matters within the ordinary scope of a solicitor's employment (u).
- vi. (Perhaps.) Newspaper reports of judicial proceedings (see *infra*).

*Qualified privilege exists in the case of—*

- i. Fair and accurate reports of proceedings in Parliament, public judicial proceedings, or meetings within s. 4 of the *Law of Libel Amendment Act, 1888*, and extracts from or abstracts of Parliamentary papers and reports.
- ii. Statements made on an occasion which is privileged through the existence of some interest or duty.

i. At Common Law a qualified privilege attaches to fair and accurate reports of Parliamentary proceedings (x) and judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court (y) whether so exercised in

(q) *Hodson v. Pare*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

(r) *Bottomley v. Brougham*, [1908] 1 K. B. 154; 77 L. J. K. B. 311; and see *Burr v. Smith*, [1909] 2 K. B. 806; 78 L. J. K. B. 889.

(s) *Royal Aquarium, etc., Society v. Parkinson* (*ubi supra*). But a qualified privilege attaches to statements at such proceedings (*id.*).

(t) *Attwood v. Chapman*, [1914] 8 K. B. 275; 83 L. J. K. B. 1666; 80 T. L. R. 596. See also *Smith v. National Meter Co., Ltd.*, [1945] 1 K. B. 648; 115 L. J. K. B. 321, where it was held not to apply to proceedings before a medical referee.

(u) *More v. Weaver*, [1928] 2 K. B. 520; 97 L. J. K. B. 721. It is, however, to be noted that, in *Minter v. Priest*, [1930] A. C. 558; 99 L. J. K. B. 391, some doubts were expressed in the House of Lords as to whether this privilege is absolute or qualified.

(x) *Wason v. Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.

(y) *Kimber v. The Press Association*, [1893] 1 Q. B. 65, at p. 68; 62 L. J. Q. B. 152. See also *Curry v. Walter*, 1 B. & P. 525; 4 R. R. 717; *Lewis v. Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 113 R. R. 768.

Court or in chambers (a), and even when so exercised upon an *ex parte* application (a).

The same privilege attaches also to the proceedings of a quasi judicial body as, for example, the General Medical Council (b). But it does not apply to proceedings before a domestic tribunal, such as the stewards of the Jockey Club, at which the public are not entitled to be present (c). The privilege, moreover, does not apply when the proceedings are unfit for publication (d) nor probably when their publication has been prohibited by the Court or is forbidden by statute (e).

So far as concerns judicial proceedings the Common Law privilege was extended by s. 8 of the *Law of Libel Amendment Act*, 1888, which provides that "a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter". From the absence of any reference to malice in this section, as compared with s. 4 (*infra*) it appears that in this case the privilege is absolute.

By s. 4 of the *Law of Libel Amendment Act*, 1888, it is provided that a fair and accurate report published in any newspaper of the proceedings of a public meeting (f), or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed under any Act of Parliament, or of any meeting of commissioners authorised to act by letters patent, Act of Parliament, or other lawful warrant or authority, select committees of either House of Parliament,

(a) *Ryalls v. Leader*, L. R. 1 Ex., at p. 301; 35 L. J. Ex. 185. See also, *Smith v. Scott*, 2 C. & K. 580.

(b) *Kimber v. The Press Association* (*supra*).

(c) *Allbutt v. General Medical Council*, 28 Q. B. D. 400; 58 L. J. Q. B. 606.

(d) *Chapman v. Lord Ellesmere*, [1932] 2 K. B. 481; 101 L. J. K. B. 376, and see *post*, p. 445. But, where a person has agreed to the publication of the decision of such a tribunal in a particular periodical, the principle of *volenti non fit injuria* prevents him from claiming damages in respect of such publication (*id.*).

(e) *Steele v. Brannan*, L. R. 7 C. P. 261; 48 L. J. M. C. 85.

(f) By the Judicial Proceedings (Regulation of Reports) Act, 1926, it is a criminal offence to publish in relation to any judicial proceedings, any indecent matter, or, in relation to judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation, or restitution of conjugal rights, any particulars other than those specified by the Act.

(g) *I.e.*, "Any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted" (*id.*).

justices of the peace in quarter sessions assembled for administrative or deliberative purpose, and the publication, at the request of any Government office or department, officer of State, Commissioner of police, or chief constable, of any notice or report issued by them for the information of the public shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But it is also provided that nothing in the section shall authorise the publication of any blasphemous or indecent matter, or protect the publication of any matter not of public concern and the publication of which is not for the public benefit. It is further provided that the protection afforded by the section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication appeared a reasonable letter or statement by way of contradiction or explanation and has refused or neglected to insert the same.

By s. 3 of the *Parliamentary Papers Act*, 1840, it is provided that in any proceeding for printing any extract from or abstract of any Parliamentary paper or report it may be shown in defence that such extract or abstract was published *bona fide* and without malice.

ii. An occasion is privileged, and a qualified privilege exists when a statement regarding the plaintiff is made to a third person by a person who "has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential" (g). "If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within narrow limits" (h).

An example of privilege afforded by *duty* occurs where one person is asked for information affecting the credit or character

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(g) *Adam v. Ward*, [1917] A. C., at p. 334; 86 L. J. K. B. 849, as explained in *White v. J. & F. Stone, Ltd.*, [1939] 2 K. B. 827; 108 L. J. K. B. 869. In the case of *Watt v. Longsdon*, [1930] 1 K. B., at p. 147; 98 L. J. K. B. 711, this rule was expanded as follows by Scrutton, L.J. There must be "either (i) a duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (ii) an interest in the speaker to be protected by communicating information, if true, relevant to that interest to a person honestly believed to have a duty to protect that interest, or (iii) a common interest in and reciprocal duty in respect of the subject-matter of the communication between speaker and recipient".

(h) *Toogood v. Spyring*, 1 C. M. & R., at p. 193; 3 L. J. Ex. 347; 40 R. R. 523.

of another, in which case he is justified in giving it provided that he makes a reply which he *bona fide* believes to be true, and also *bona fide* believes that the person making the inquiry has an interest which justifies it, and provided also that the information is given from a *bona fide* sense of duty and not from motives of self-interest and profit (i). And, if the information is given to a confidential agent of the person inquiring, the agent is under a legal duty to repeat it to his principal, and this duty is the basis of a distinct privilege arising out of the relationship of principal and agent (k).

Thus, in *Macintosh v. Dun* (l), a trade protection society was carried on for profit by certain persons who held themselves out as collectors of information which they volunteered to sell to their customers. It was held that publications made in the course of carrying on such a trade for profit were not made in discharge of any public or private duty.

In *London Association, etc. v. Greenlands* (k), an unincorporated association was formed for the purpose (*inter alia*) of making inquiries as to the credit of firms and individuals. The association did not trade for profit and the qualification for membership was the payment of an annual subscription in return for which a member could obtain a certain number of inquiries. A member applied for information as to a company with which he proposed to deal and the secretary obtained from an agent of the association and sent to the member a report which was defamatory of the company. An action was brought by the company against the association, the agent and the secretary. In the House of Lords the only question was as to the liability of the secretary, and it was held that on making the inquiry and report he was acting as agent for the member, and that the publication of the report to the member was therefore made on a privileged occasion. But it was pointed out that, if the secretary had been the agent of the association, and if, as in *Macintosh v. Dun*, the association had been "trading for gain in the characters of other people", the occasion of the publication of the report would not have been privileged.

There may be a duty to give information as to the character or credit of another person even though no request for it has been made. Thus, in *Stuart v. Bell*, the plaintiff was a valet, who had been staying with his master at Newcastle, as guests of

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(i) *Macintosh v. Dun*, [1908] A. C. 390; 77 L. J. P. C. 113; *London Association for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A. C. 15; 86 L. J. K. B. 698 (inquiries as to credit). Compare *Child v. Afflick*, 9 B. & C. 403; 7 L. J. (o.s.) K. B. 26; 32 R. R. 216 (inquiry as to character of a servant); *Waller v. Loch*, 7 Q. B. D. 169; 51 L. J. Q. B. 274 (inquiry as to whether a person was deserving of charitable assistance).

(k) *London Association, etc., v. Greenlands* (*ubi supra*).

(l) *Ubi supra*.

the defendant, who was Mayor of Newcastle. While they were there the Chief Constable of Newcastle received from the Chief Constable of Edinburgh a letter stating that the plaintiff was suspected of having committed a theft at an hotel, and suggesting a cautious inquiry. This letter was shown by the Chief Constable of Newcastle to the defendant, who, without making any inquiries, told the plaintiff's master that there had been a theft at the hotel, and that suspicion had fallen upon the plaintiff. It was held that it was the defendant's moral or social duty to communicate to the plaintiff's master the information received from the police (*m*). So also a communication volunteered to a bishop with regard to the conduct of a clergyman in his diocese is privileged (*n*). So also is a communication volunteered by one member of a family to another with a view to dissuade the latter from making an undesirable marriage (*o*).

Where the duty is clear it does not matter whether the statement was volunteered or in answer to an inquiry; but in cases which are near the line the circumstance that the information is volunteered is an element for consideration (*p*).

An example of a communication made by reason of a *common interest* is afforded by the case of *Hunt v. Great Northern Ry.* (*q*). Here the plaintiff was a guard in the service of the defendants, and was dismissed on the ground of neglect of duty. The defendants published his name in a printed monthly circular addressed to their servants, stating that he had been dismissed and the reasons for his dismissal. It was held that the publication was privileged, the defendants having an interest in stating to their servants and the latter having an interest in knowing what was regarded as misconduct.

So also, in *Roff v. British, etc., Manufacturing Co. and Gibson* (*r*), a dispute with regard to a commercial transaction having arisen between A and B, it was proposed by A to appoint the plaintiff as his arbitrator; B, however, objected to the appointment, and wrote to A a letter containing statements defamatory of the plaintiff. It was held that the letter was a communication between parties having a common interest in its subject-matter, and was therefore privileged.

(*m*) [1891] 2 Q. B. 341; 60 L. J. Q. B. 577; 64 L. T. 633.

(*n*) *James v. Boston*, 2 C. & K. 4; 80 R. R. 818.

(*o*) *Todd v. Hawkins*, 8 C. & P. 88; 56 R. R. 834.

(*p*) *Macintosh v. Dun*, [1908] A. C., at p. 399; and see *Pattison v. Jones*, 13 B. & C., at p. 586; 7 L. J. (o.s.) K. B. 26.

(*q*) [1891] 2 Q. B. 189; 60 L. J. Q. B. 498.

(*r*) [1918] 1 K. B. 677; 87 L. J. K. B. 996.

The mere fact that the defendant believed that he was under a duty to make the communication or had an interest in making it is not sufficient to create a privilege if in fact no duty or interest existed (s).

But protection is lost if the publication is excessive because it is wider than is necessary in view of the particular duty or interest that is involved. On this point two cases may be compared:—

In *Adam v. Ward* (s), the plaintiff, who was formerly an officer in a cavalry regiment, had been placed on the retired list on half pay. He then became a Member of the House of Commons, where he made a speech containing charges against the General commanding the brigade of which his late regiment formed part. The General referred the matter to the Army Council who, by the defendant, their secretary, wrote to him a letter vindicating him from the charges and containing statements defamatory of the plaintiff, and sent the letter to the Press for publication. The letter was widely published in the British and Colonial Press. *Held*, that the publication was not excessive. The matter was one vitally affecting the military forces of the Crown and hence one in which all subjects of the Crown were interested. Further, the plaintiff's speech was delivered in such circumstances that it might well reach all such members of the public as would be reached by the publication of the defendant's letter.

In *Chapman v. Ellesmere* (t) an inquiry was held before the stewards of the Jockey Club as to the alleged drugging of a horse and the responsibility of the plaintiff who was its trainer. The plaintiff had a licence to train horses to run under the Rules of Racing. A condition of this licence was that it might be withdrawn by the stewards of the Jockey Club and that such withdrawal might be published in the *Racing Calendar*. The result of the inquiry was published in the *Racing Calendar* and also to news agencies and to *The Times*. *Held* (i) that the publication in the *Racing Calendar* was privileged because on a reasonable view of the duty of the defendants to keep racing free from impropriety they were entitled to publish their decisions in their own organ, even if that organ was not prevented by them from coming into the hands of the public; but (ii) that the publications to the news agencies and *The Times* and by *The Times* were not

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(s) *Adam v. Ward*, [1917] A. C., at p. 334; 86 L. J. K. B. 849.

(t) [1932] 2 K. B. 481; 101 L. J. K. B. 476.



privileged because there is no general interest to the public or duty owed to the public to publish matters which concern a section of the public only.

Protection is not lost *merely* because a statement which is made on a privileged occasion is made in the presence of persons with regard to whom no interest or duty exists.

Thus, in *Two good v. Spyring* (u), the plaintiff was a carpenter who did some work for the defendant, but did so in a negligent manner and got drunk while doing it. The defendant had reason to believe that the plaintiff had also broken open his cellar door and obtained access to his cellar. The defendant met the plaintiff in the presence of a third person and accused him of having broken open the door and got drunk and spoiled the job. *Held*, that the fact that the accusation was made in the presence of a third person did not of *itself* prevent it from being a privileged communication.

So also, in *Pittard v. Oliver* (x), it was held that a statement which was made before a board of guardians and which would have been privileged if only guardians had been present, did not lose its protection because it was made in the presence of reporters or of persons other than guardians who attended the proceedings.

But as was pointed out in the first of these cases, although the mere fact of a third person being present does not take away the privilege, yet it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury in determining whether the defendant acted *bona fide* in making the charge or was influenced by malice. And, if an opportunity was sought for making before third persons a charge which might have been made in private, that would afford strong evidence of a malicious intention. With regard to publication to clerks and servants it has been held that "if a business communication is privileged, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" (a). Thus, privilege is not destroyed because in the ordinary reasonable methods of business a matter comes before copying clerks or typists or clerks who open letters (b).

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(u) 1 Cr. M. & R. 281; 3 L. J. Ex. 347.

(x) [1891] 1 Q. B. 174; 60 L. J. Q. B. 219.

(a) *Edmondson v. Birch & Co., Ltd.*, [1907] 1 K. B., at p. 382; 76 L. J. K. B. 316, following *Borsius v. Goblet Frères*, [1894] 1 Q. B. 812; 63 L. J. Q. B. 101.

(b) *Rolf v. British, etc., Manufacturing Co. and Gibson*, [1918] 2 K. B. 677; 87 L. J. K. B. 996; *Osborn v. Thomas Boulter & Son*, [1930] 2 K. B. 226; 99 L. J. K. B. 356. In *Pullman v. Hill* (*ante*, p. 426), it was argued

But this principle does not apply where the area of publication is unnecessarily enlarged as, *e.g.*, where, though an occasion is privileged as between the writer of a communication and the person to whom it is communicated, it is sent on a postcard which could be understood by persons other than the plaintiff as referring to the plaintiff (c).

*Malice.*—In cases of qualified privilege it is for the Judge to say whether there is any evidence of express malice fit to be left to the jury, that is, whether there is any evidence on which a reasonable man could find malice (d). Express malice may be inferred by the jury: (i) from any extrinsic facts which show that the defendant was actuated by spite or some indirect motive, as, *e.g.*, from the publication of previous libels upon the plaintiff (e), or from the fact that the defendant made statements which he knew to be false (f); and (ii) from the terms of the publication or communication (g); but the language of privileged communications must not be submitted to a strict scrutiny, and the mere fact that it goes beyond the absolute exigency of the occasion is not evidence of malice (h); thus where a defamatory statement is made in self-defence, the defendant "will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so" (i).

Where a libel contains defamatory matter extraneous to the subject with respect to which the privilege exists, such matter is not only itself unprotected but may be evidence of malice which

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without success that the publication by the defendant to his servants was privileged, but in the later authorities that case has been distinguished on the ground that the decision is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and to have it copied by, a clerk, and that this is a decision of fact which is not binding on any Court in modern times: [1930] 2 K. B., at p. 238.

(c) *Sadgrove v. Hole*, [1901] 2 K. B. 1; 70 L. J. K. B. 455. If it could not be so understood there would be no publication "of and concerning" the plaintiff (*id.*).

(d) *Adam v. Ward*, [1917] A. C., at p. 318; 86 L. J. K. B. 849.

(e) *Chubb v. Westley*, 6 C. & P. 436; *Barrett v. Long*, 3 H. L. C. 395; *Adam v. Ward* (*infra*).

(f) *Clark v. Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230.

(g) *Adam v. Ward*, [1917] A. C., at pp. 318, 327.

(h) *Id.*, at p. 327.

(i) *Id.*, at p. 339; and see *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; 42 L. J. P. C. 11.

will take away protection from the matter which would otherwise be protected (*k*).

4. *Apology (applicable only to libels contained in public newspapers and periodicals).*—By s. 2 of Lord Campbell's Libel Act, 1848, it is provided that in an action for libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or periodical a full apology, or if such newspaper or periodical should be published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical to be selected by the plaintiff. By s. 2 of the Libel Act, 1845, a payment into Court by way of amends must accompany a plea under Lord Campbell's Act, and must be pleaded as an integral part of the plea (*l*).

*Apology in mitigation of damages.*—By s. 1 of Lord Campbell's Act, 1848, it is provided that the defendant in any action for defamation, after giving notice of his intention to do so when he delivers his defence, may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff before the commencement of the action, or so soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

*Other evidence in mitigation of damages.*—By s. 6 of the Law of Libel Amendment Act, 1888, it is also provided that in any action for a libel contained in a newspaper the defendant may prove, in mitigation of damages, that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation for a libel or libels to the same purport or effect as the libel for which the action has been brought.

## SECTION 2.—Language Actionable on other Grounds

1. *Slander of title.*—An action for slander of title lies, strictly speaking, only where the defendant has made an unfounded assertion that the owner of real property has no title to it; a similar action will, however, lie where the assertion relates to goods (*m*). But the action is not, in either case, an action of

(*k*) *Adam v Ward*, [1917] A. C., at pp. 318, 329, 348.

(*l*) Order XXII, rr. 1, 6.

(*m*) *Wren v. Weild*, L. R. 4 Q. B., at p. 734; 38 L. J. Q. B. 327.

defamation, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title: the plaintiff must accordingly prove both express malice and special damage, as well as the falsehood of the assertion (n).

2. *Disparagement of goods*.—An action on the case will also lie for untrue disparagement of the plaintiff's goods whereby he has suffered special damage. But in order to maintain such an action it is not sufficient that the defendant has used extravagant phrases in commendation of his own goods which may be an implied disparagement of the goods of all others in the same trade.

Thus, in *White v. Mellin* (o), the defendant was the proprietor of an infants' food, called V's food: in the course of business as a chemist he sold the plaintiff's food, affixing to the plaintiff's wrappers a label advertising his own food, and containing the statement that it was "far more nutritious and healthful than any other preparation yet offered". It was held that this statement was not a disparagement of the plaintiff's goods, but a mere puffing of the defendant's own food, and also that, even if it were a disparagement and untrue, no action would lie in the absence of any evidence of special damage.

3. *Statements unjustifiably published and causing special damage*.—"That an action will lie for written or oral falsehoods, not actionable *per se* or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title" (p). In order to support such an action both express malice and actual damage must be proved. Thus, where the defendant maliciously published of the plaintiff that he had ceased to carry on business, it was held that the plaintiff could recover damages which he had suffered from loss

(n) *Id.*, and see *British Railway Traffic, etc., Co. v. The C. R. C. Co. and the London County Council*, [1922] 2 K. B. 260; 91 L. J. K. B. 224 (reviewing the authorities).

(o) *White v. Mellin*, [1895] A. C., at p. 167; 64 L. J. Ch. 808. See also *ante*, p. 252. It follows accordingly that, where the defendant has merely acted within his rights by stating that his goods are better than those of the plaintiff, "an allegation that the statement was made maliciously is not enough to convert a lawful into an unlawful statement": *Hubbuck & Sons v. Wilkinson*, [1899] 1 Q. B., at p. 91; 68 L. J. Q. B. 84; and see *ante*, p. 254.

(p) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.

of business caused by that statement (q). Where, however, the defendants, who were the proprietors of a music hall, incorrectly published that the plaintiff would appear at their hall during a certain week, in consequence of which she lost an engagement at another place during that week, it was held that, as the statement was published with a *bona fide* belief in its truth, the plaintiff had no cause of action (r).

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(q) *Id.* See also *Riding v. Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281, as explained in [1892] 2 Q. B., at p. 534. And for another example of the same class of case, see *Wilkinson v. Downton* (*ante*, p. 253).

(r) *Shapiro v. La Motta*, 130 L. T. 623; 40 T. L. R. 201. See also *Balden v. Shorter*, [1933] 1 Ch. 427; 103 L. J. Ch. 191.

## PART III

### MERCANTILE CONTRACTS

#### CHAPTER I

##### PRINCIPAL AND AGENT

It is almost impossible to give any exact definitions which apply to all classes of agents or servants, or which completely distinguish an agent from a servant. The essence, however, of agency is that one person is authorised to act or contract on behalf of another whose *representative* he is to be and in whom are to vest all rights and liabilities arising from his transactions as agent. The term "servant", on the other hand, applies to a person who, as a mere instrument for the performance of specific work, gives some definite time and labour to (a), and is under the control and bound to obey the orders of, his his employer (b). Thus the relationship of master and coachman does not of itself create agency, because a coachman is not employed to represent his master but merely to perform certain specific work (c). Conversely, an agent may not be bound to give any time or labour to his principal, as, *e.g.*, where there is a contract that he shall be paid commission on work done by him, but no contract binding him to do any work (d). But service and agency may co-exist in the same person, as, for example, if a servant is authorised to make a contract on behalf of his master (e).

##### SECTION 1.—*The Creation of Agency*

As between principal and agent, a contract of agency, like any other contract, can exist only by *mutual assent* (f), *except*

(a) *R. v. Walker*, Dears. & B. C. C. 600.

(b) *R. v. Negus*, L. R. 2 C. C. R., at p. 85; 42 L. J. M. C. 62. "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger [are] the grounds for holding it to be a contract of service." See *Simmons v. Heath Laundry*, [1910] 1 K. B., at pp. 549, 550; 79 L. J. K. B. 395.

(c) *Wright v. Glyn*, [1902] 1 K. B. 475; 71 L. J. K. B. 497.

(d) See *Levy v. Goldhill*, [1917] 2 Ch., at p. 308; 86 L. J. Ch. 693.

(e) See *Maunder v. Conyers*, 2 Stark. 281.

(f) *Markwick v. Hardingham*, 15 Ch. D. 339; 48 L. T. 647; *Pole v. Leask*, 33 L. J. Ch. 155.

in the case of *agency of necessity* (g). Such assent may be given expressly, or may be inferred or implied from the conduct or situation of the parties. Thus, at a sale by auction, the auctioneer is an agent for the purpose of signing the contract of sale on behalf of the highest bidder so as to satisfy section 4 of the Statute of Frauds, or section 40 of the Law of Property Act, 1925, or section 4 of the Sale of Goods Act, 1898, the assent of the bidder being implied from his conduct in bidding (h). The assent of the principal may also be given by his *subsequent ratification* of an act done on his behalf (i).

But, although there is no contract of agency, one person may be liable as principal for the acts of another whom he *holds out* as having authority to act on his behalf (k), or whose authority he is for any reason estopped from denying.

An express contract of agency may be in any *form*—unless in a particular instance it must comply with some special requirement of a statute (l) or of the Common Law (m).

*Capacity.*—The capacity of a person to enter into a contract of agency, whether as principal or agent, depends upon his general capacity to contract (n).

As between principal and third persons the act of an agent is deemed to be the act of his principal. The validity of a contract made by an agent depends therefore upon the capacity of his principal. Thus an infant is not liable for contracts made on his behalf by an agent unless he would have been liable if they had been made by him personally (o).

Conversely, the incapacity of an agent to contract on his own account is immaterial, except as regards his liability either to his principal or to third persons; the infancy of an agent will

(g) *Post*, p. 473.

(h) *Emmerson v. Heelis*, 2 Taunt. 38; 11 R. R. 520; *Bell v. Balls*, [1897] 1 Ch. 668; 66 L. J. Ch. 897.

(i) *Post*, p. 473.

(k) *Drew v. Nunn*, 4 Q. B. D., at p. 667; 48 L. J. Q. B. 591.

(l) As, e.g., under s. 4 of the Statute of Frauds (*ante*, p. 58), or, in certain mixed contracts of sale and agency, under s. 4 of the Sale of Goods Act, 1893 (*post*, p. 639). But an agent need not have authority in writing merely because a contract to be made between him and a third person comes within these sections: *Coles v. Trecothick*, 9 Ves. Jun. 234; 7 R. R. 167; *Higgins v. Senior*, 8 M. & W. 834; 11 L. J. Ex. 199; *Heard v. Pilley*, L. R. 4 Ch. 458; 38 L. J. Ch. 718.

(m) As, e.g., in some contracts of corporations (*ante*, p. 146), and where the agent is appointed to execute a deed.

(n) *Drew v. Nunn*, 4 Q. B. D., at p. 666; 48 L. J. K. B. 591; *Oliver v. Woodroffe*, 1 M. & W. 650; 8 L. J. Ex. 105; *Daily Telegraph v. M'Laughlin*, [1904] A. C. 776.

(o) See *Helps v. Clayton*, 17 C. B. (N. S.) 553; 34 L. J. C. P. 1.

not, for example, affect the validity of a contract made by him on behalf of his principal (p).

One person may act as agent for both parties to a contract, as, e.g., in the case of contracts made through a broker and sales by auction.

*What may be done by means of an agent.*—The general rule is that a person who is *sui juris* can appoint an agent to do anything which he himself has the capacity to do (q). Thus, where a statute requires a person's signature, it is sufficient if his name is signed by his agent, unless the statute expressly or by implication requires his personal signature.

Thus it has been held that signature by an agent is sufficient for the execution of a bill of sale (r), for subscription to a memorandum of association (s), and for the execution of a deed of arrangement (t).

This general rule is, however, qualified by the maxim *Delegatus non potest delegare*, which prevents the delegation of powers and duties of a confidential and personal nature. Thus a trustee may not delegate to anyone else the performance of his duties, unless such delegation is expressly permitted by the trust, or by statute, or is a moral necessity from the usages of mankind, or is to a purely ministerial agent (u). Similarly, an agent may not, as a rule, delegate his agency to a sub-agent (w).

## SECTION 2.—Duties of Agent to Principal

1. Where there is a valid and enforceable *contract* of agency, an agent who fails to perform it is liable in damages for breach of contract; but in the absence of a contract under seal or for valuable consideration a person who undertakes an agency is not liable for mere non-feasance (y), though if he does in any way act as agent he is liable to his principal for any breach of duty or negligence in the execution of the agency (z).

(p) *Re d'Angibau*, 15 Ch. D., at p. 246; 49 L. J. Ch. 756.

(q) *Jackson & Co. v. Napper*, 35 Ch. D., at pp. 172, 173; 56 L. J. Ch. 406; *Bevan v. Webb*, [1901] 2 Ch., at p. 77; 70 L. J. Ch. 536. Note, however, the prohibitions imposed by s. 5 of the Moneylenders Act, 1927, upon the employment by moneylenders of agents or canvassers (*anti*, p. 143).

(r) *Furnival v. Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178.

(s) *Whitley Partners*, 82 Ch. D. 337; 55 L. J. Ch. 540.

(t) *Re Wilson*, [1916] 1 K. B. 382; 85 L. J. K. B. 329.

(u) *Speight v. Gaunt*, 9 A. C. 81; 53 L. J. Ch. 419; *Re Brier*, 26 Ch. D. 238; *Jobson v. Palmer*, [1898] 1 Ch. 71; 62 L. J. Ch. 180.

(w) *Post*, p. 457.

(y) *Turpin v. Bilton*, 5 M. & G. 455; 12 L. J. C. P. 167.

(z) *Balfe v. West*, 18 C. B. 466; 22 L. J. C. P. 175.



2. In executing his agency every agent is bound to obey the express instructions of his principal (a), provided that they are lawful (b) and such as his principal has power to give. On failure to do so he is liable for any damage caused by his disobedience, irrespective of whether he has in fact been guilty of negligence (c). Conversely, however, if he is clearly authorised to do an act which is imprudent, he is not liable for loss thereby occasioned to his principal (d); and if his authority is given in such ambiguous terms as to be reasonably capable of more than one construction, and he acts in good faith upon one of the constructions of which it is capable, his principal will be bound with respect both to the agent and to third persons, although it was not the construction intended by him (e).

8. Subject to any express instructions of the principal, the following powers are impliedly conferred and imposed upon every agent—

- (i) that he shall have power to act, and shall act, in accordance with the ordinary course of business (f) and according to the general practice and usage of the particular business in which he is engaged, unless such practice or usage is either illegal (g) or is unreasonable and was unknown to the principal at the time of entering into the contract of agency (h);
- (ii) that he shall have power to do, and shall do, whatever

(a) *Smart v. Sandars*, 3 C. B. 380; 15 L. J. C. P. 39; 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 849; *Fray v. Voules*, 1 E. & E. 839; 28 L. J. Q. B. 232.

(b) *Webster v. De Tastet*, 7 T. R. 157; 4 R. R. 402; *Bezwell v. Christie*, Cowp. 395.

(c) *Stearne, etc., Co. v. Heinlsmann*, 17 C. B. (n.s.) 56; 142 R. R. 245; *Lilley v. Doubleday*, 7 Q. B. D. 510; 51 L. J. Q. B. 310; *The Hermione*, [1922] P. 162; 91 L. J. P. 186.

(d) *Overend, Gurney & Co. v. Gibb*, L. R. 5 H. L. 480; 42 L. J. Ch. 67.

(e) *Ireland v. Livingston*, L. R. 5 H. L. 395; 41 L. J. Q. B. 201; *Gould v. S. E. Ry.*, [1920] 2 K. B. 186.

(f) "A person who authorises another to contract for him, authorises him to make that contract in the usual way": *Bayliffe v. Butterworth*, 1 Ex. at p. 428.

(g) *Hodgkinson v. Kelly*, L. R. 6 Eq., at p. 502; 37 L. J. Ch. 837.

(h) See *Blackburn v. Mason*, 68 L. T. 510; 9 T. L. R. 286; *Robinson v. Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362. Any custom is unreasonable which changes the nature of the contract by allowing an agent to turn himself into a principal: *Robinson v. Mollett* (*ubi supra*). And no evidence can be admitted of a custom which is inconsistent with the express terms of a written contract: see *Muller, Gibb & Co v. Tyrrer*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259.

is necessary for, or ordinarily incidental to, the execution of his agency (i);

- (iii) that in all matters which are left to his discretion he shall act with the most complete good faith and, to the best of his judgment, solely for the benefit of his principal (k).

If an agent is guilty of a breach of any of these duties, he is liable for any loss or damage thereby occasioned to his principal.

Thus an agent who is employed to receive payment of a debt has *prima facie* authority to receive it only in cash, and not by a bill of exchange or cheque, or by a settlement of accounts between himself and the debtor (l); if, therefore, an agent, without express authority and in the absence of any general usage to do so, accepts in payment of a debt a bill of exchange or cheque which is subsequently dishonoured, he is liable for any loss thus caused to his principal (m). Where, however, the authority of an agent was not expressly limited to receiving payment in cash he was held not to be liable to his principals because, knowing that the debtor was in financial difficulties, he obtained all the cash that he had and gave him extended credit for the balance, thinking that this was the most prudent course to adopt (n).

4. An agent must keep proper accounts of all his dealings on behalf of his principal (o), and on failure to do so is liable to an action of account (p). He must also on request produce to his principal, or to any proper and suitable person authorised by his principal, all accounts and documents in his hands relating to his principal's business (q). And he must keep the money and property of his principal separate from his own (r); if he mixes his own money or property with that of his principal, so

(i) *Dingle v. Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 148; and see, further, *post*, p. 471.

(k) *Smart v. Sanders*, 3 C. B., at p. 399; 71 R. R. 884; 15 L. J. C. P. 39; *Heath v. Parkinson*, 42 T. L. R. 693.

(l) *Sweeting v. Pearce*, 7 C. B. (N.S.) 449; 29 L. J. C. P. 265; *Williams v. Evans*, L. R. 1 Q. B. 352; 85 L. J. Q. B. 111; *Pape v. Westacott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222.

(m) *Pape v. Westacott* (*ubi supra*).

(n) *Gokal Chand-Jagan Nath v. Nand Ram Das Aina*, [1939] A. C. 106; 108 L. J. P. C. 9.

(o) *Clarke v. Tipping*, 9 Beav. 384; 78 R. R. 355.

(p) *Harsant v. Blaine*, 56 L. J. Q. B. 511.

(q) *Dadswell v. Jacobs*, 84 Ch. D. 278; 56 L. J. Ch. 233. *Held*, however, that a clerk in a rival and unfriendly business was not a proper person.

(r) *Clarke v. Tipping* (*ubi supra*).

that they cannot be distinguished, it will be assumed against him that the whole belongs to his principal (s).

5. An agent must upon request pay over to his principal all money received on his behalf, although the contract or transaction in respect of which it was received was void (t) or illegal (u), and upon failure to do so is liable to an action for money had and received (w); but it is otherwise if the contract or transaction was illegal as between himself and his principal (y).

If, however, money has been obtained by an agent wrongfully, or in such circumstances that he is bound to return it and he does return it, he is not liable in respect thereof to his principal (z).

6. An agent must, in the execution of his agency, act with reasonable care, diligence and skill. If he is acting gratuitously, he is liable only for failure to use reasonable care and diligence and such skill as he has. But a person who holds himself out for employment for reward in any capacity is bound, not only to exercise reasonable care and diligence, but to *possess* and exercise reasonable skill (a).

Thus, in *Baxter v. Gapp & Co.* (b), the defendants were employed by the plaintiff to value property upon the security of which he intended to advance money. Through want of skill and care the valuation was excessive and the plaintiff, in consequence, suffered loss owing to the default of the mortgagor. It was held that he was entitled to recover from the defendants all the actual loss suffered by him as a result of advancing the money.

(s) *Lupton v. White*, 15 Ves. 432; *Cook v. Addison*, L. R. 7 Eq. 466; 38 L. J. Ch. 322; 20 L. T. 212. If he pays his principal's money into his own account at a bank, he is liable for the full amount on failure of the bank: *Massey v. Banner*, 1 Jac. & W. 241; *Wren v. Kirtan*, 11 Ves. 377; 8 R. R. 174; *Robinson v. Ward*, 2 C. & P. 59.

(t) *Bridger v. Savage*, 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 1 T. L. R. 585; *De Mattos v. Benjamin*, 63 L. J. Q. B. 248; 70 L. T. 560; 10 T. L. R. 221.

(u) *Bourfield v. Wilson*, 16 M. & W. 185; 16 L. J. Ex. 44; *Tennant v. Elliott*, 1 B. & P. 3, 4 R. R. 755; *Farmer v. Russell*, 1 B. & P. 296.

(x) *Harsant v. Blaine*, 56 L. J. Q. B. 511; 3 T. L. R. 689.

(y) *Nicholson v. Gooch*, 5 E. & B. 999; 25 L. J. Q. B. 137. See also *Sykes v. Beadon*, 11 Ch. D. 170; 48 L. J. Ch. 522.

(z) *Murray v. Mann*, 2 Exch. 538; 17 L. J. Ex. 256; *Stevens v. Lee*, 2 C. L. R. 251.

(a) *Ante*, p. 336.

(b) *Barter v. Gapp & Co. Ltd.*, [1939] 2 K. B. 271; 108 L. J. K. B. 522.

The amount of diligence required from an agent is shown by the case of *Keppel v. Wheeler* (c). There agents were employed for the sale of property and procured an offer of £6,150, which was accepted by their principal "subject to contract" (d). Immediately afterwards they obtained from a third person an offer to buy from the prospective purchaser for £6,750, but did not communicate this offer to their principal, believing that their obligation to him was at an end. The third person ultimately bought from the purchaser. It was held that the agents had committed a breach of their duty to their principal, and that the measure of damages was the sum of £591, i.e., the difference between £6,150 and £6,750, less the commission of  $1\frac{1}{2}$  per cent., which principal would have had to pay. Their position was that they were agents, not merely to obtain a purchaser, but to obtain the best price that could reasonably be obtained, and their duty to use reasonable diligence in obtaining such a price continued until a definite binding contract had been concluded. Until that time they were bound to communicate to their principal any better offer that they obtained or any information received by them which was of a nature to influence materially his judgment in continuing or ceasing the negotiations.

7. As a general rule, the principle *Delegatus non potest delegare* prevents an agent from delegating his duties or powers without the consent of his principal, except for such purely ministerial acts as, in the ordinary course of business, are usually done by a clerk or servant (e). The consent of the principal may, however, be inferred where, from the conduct of the parties, the usage of trade, or the nature of the particular business, it may reasonably be presumed that such authority should exist, or when, in the course of the employment, emergencies arise which impose upon the agent a necessity for delegation (f).

But even though an agent is not guilty of a breach of duty in delegating his powers, he cannot establish privity of contract between the sub-agent and his own principal unless he has authority to do so (g) or his act in so doing is ratified by the

(c) [1927] 1 K. B. 577; 96 L. J. K. B. 483.

(d) *Ante*, p. 40.

(e) *Loid v. Hall*, 2 C. & K. 698; *Ex p. Birmingham Banking Co.*, L. R. 3 Ch. 651.

(f) *De Bussche v. Alt*, 8 Ch. D., at pp. 310, 311; 47 L. J. Ch. 381.

(g) *New Zealand Land Co. v. Watson*, 7 Q. B. D. 354; 50 L. J. Q. B. 433; *Hampton v. Glamorgan County Council*, [1917] A. C. 18; 86 L. J. K. B. 106.

principal (h). Accordingly, in the absence of such authority or ratification, the original principal is not liable for the acts of the sub-agent (i) and incurs no liability to, and has no rights against, the sub-agent, who, for his part, can look to, and is liable to, only the agent who appointed him (k).

But an agent who employs a sub-agent is always (l) liable to his principal for any money received by the sub-agent on behalf of his principal, and is responsible for any damage caused to his principal by the sub-agent's negligence or breach of duty (m). And if a sub-agent is in a fiduciary relation to the original principal, he is accountable to the latter for any money received on his behalf (n).

8. An agent must never, except after full disclosure of every material fact, and with the consent of his principal, enter into any transaction in which his own interest may conflict with his duty to his principal (o). This rule applies to two classes of cases, namely, (i) transactions by agents with persons other than their principals, and (ii) transactions by agents with their principals. Thus:—

- i. An agent who is acting for a vendor of property cannot also act for the purchaser unless he makes the fullest disclosure to each principal of his interest and obtains the consent of each to the double employment (p).

No custom can make valid a breach of this rule (p).

Moreover, the rule applies even where the agent so acts by two distinct and independent departments of his business, e.g., where his estate department acts for the vendor, and his building department acts for the purchaser (q).

So also a director of a company, unless authorised by

(h) *Mason v. Clifton*, 3 F. & F. 899; *Keay v. Fenwick*, 1 C. P. D. 745.

(i) *Doe d. Rhodes v. Robinson*, 3 Bing. N. C. 677; 6 L. J. C. P. 235; see also *Dunlop v. De Murrieta & Co.*, 3 T. L. R. 166.

(k) See *Cull v. Backhouse*, 6 Taunt. 149; *Schmalinq v. Tomlinson*, 6 Taunt. 147; *Stephens v. Badcock*, 3 B. & Ad. 354; 1 L. J. K. B. 75; 37 R. R. 448; *Sims v. Brittain*, 4 B. & Ad. 375; *Lockwood v. Abdy*, 14 Sim. 437.

(l) *Mackersy v. Ramsays. Donars & Co.*, 9 Cl. & Fin., at p. 845; 57 R. R. 183.

(m) *Id.*, and see *Skinner v. Weguelin*, 1 C. & E. 12; *Swire v. Francis*, 3 A. C. 106; 47 L. J. P. C. 18; 37 L. T. 551.

(n) *Powell and Thomas v. Evan Jones & Co.*, [1905] 1 K. B. 11; 74 L. J. K. B. 115; see also *Collins v. Brook*, 5 H. & N. 700; 20 L. J. Ex. 255.

(o) *Parker v. McKenna*, 11 R. 10 Ch., at p. 118; 44 L. J. Ch. 425; *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, [1899] 2 Ch., at p. 442; 68 L. J. Ch. 699.

(p) *Fullwood v. Hurley*, [1928] 1 K. B. 498; 96 L. J. K. B. 976.

(q) *Harrods Ltd. v. Lemon*, [1931] 2 K. B. 187; 100 L. J. K. B. 219.

the articles, may not, on behalf of the company, enter into any transaction in which he has a personal interest which may conflict with the interest of the company; and even if the articles gave him such authority, it is not sufficient for him merely to disclose that he has an interest but he must disclose its nature and extent (r).

- ii. An agent for the sale of property is not permitted to purchase it himself, nor is an agent for purchase permitted to sell to his principal his own property unless he has disclosed to his principal that he is the person buying or selling and has disclosed all the material information in his possession, and the transaction is a fair one (s); it is not sufficient that the transaction is fair if there has been any concealment or non-disclosure (t).

No custom can make valid a breach of this rule (u).

This rule is illustrated by the case of *Bentley v. Craven* (α). Here A was a grocer, and was also a partner in a firm of sugar refiners. On account of his skill in buying sugar he was accustomed to buy what was required for the firm. He sold to the firm at a fair market price, sugar which while he was a partner he had bought at a lower price in his private business. It was held that he must account to the firm for the profits which he made by the sale of the sugar.

Moreover, whenever with respect to any transaction there is an existing relationship of principal and agent, the agent must, in any contract with the principal which relates to or arises out of that transaction, make the most complete disclosure of all material facts; this rule applies even though the principal knows that he is the other contracting party and the contractual relationship preceded the relationship of principal and agent as, e.g., where a solicitor, having contracted to sell his own property, acts as solicitor for the purchaser. And, whenever the validity of any such contract or transaction between a principal and his agent is impeached, it is for the agent to satisfy the Court that full disclosure was made, and that no advantage was taken of

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(r) *Imperial Mercantile Credit Co. v. Coleman*, L. R. 6 H. L. 189; 42 L. J. Ch. 644; 36 L. T. 233. See also s. 199 of the Companies Act, 1948.

(s) *Demerara Bauxite Co. v. Hubbard*, [1923] A. C., at pp. 681, 682; 92 L. J. P. C. 148; *Regier v. Campbell Stuart*, [1939] Ch. 766; 108 L. J. 521.

(t) *McPherson v. Watt*, 8 App. Cas. 524; *Armstrong v. Jackson*, [1917] 2 K. B. 882; 86 L. J. K. B. 1375 (reviewing the authorities).

(u) *Robinson v. Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; see *ante*, p. 8.

(x) 18 Beav. 75. Compare *Gwatkin v. Campbell*, 1 Jur. (N.S.) 181.

his position, and that the contract or transaction was a fair one having regard to all the circumstances (y).

In the case of any violation of these rules the principal may recover from the agent any profit made by him, or, if rescission is still possible (a), may rescind any contract made between himself and the agent (b). Where, however, an agent sells to his principal goods which were his own property before the commencement of the agency, so that he was not in a fiduciary position when he acquired them, rescission is the only remedy (c).

9. Whenever an agent, in or as a result of the execution of his agency or from the employment of his principal's property, directly or indirectly makes any profits without the knowledge and sanction of his principal, he must account for them to his principal, and is liable to a Common Law action for money had and received to the use of his principal (d); and it is immaterial to consider the fairness of the transaction by which the profits were made, or whether the principal in fact suffered any loss (e).

Thus, in *Erskine v. Sachs* (f), a stockbroker made purchases of shares for a client, who was bound to take delivery and pay for them on August 30. The client having made default, the stockbroker, as he was entitled to do, sold the shares on August 31 on the Stock Exchange at the market price of the day, and charged the client with commission on the sale. As part of the same transaction, the stockbroker bought back the shares from the jobber to whom he had sold them. The price made by the jobber was £2 1s. 8d. to £2 2s. 6d. per share, i.e.,

(y) See *Moody v. Cox & Hatt*, [1917] 2 Ch. 71; 86 L. J. Ch. 424.

(a) As to when the right to rescind is lost, see *ante*, p. 110.

(b) *Beniley v. Craven* (*ubi supra*); *De Bussche v. Alt*, 8 Ch. D. 286; 47 L. J. Ch. 881; *Lagunas Nitrate Co. v. Lagunas Syndicate* (*ubi supra*); *Gluckstein v. Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385.

(c) *Re Lady Forrest, etc., Co.*, [1901] 1 Ch. 582; 70 L. J. Ch. 275; *Burland v. Earle*, [1902] A. C. 83; 71 L. J. C. P. 1; *Cook v. Deeks*, [1916] 1 A. C. 554; 85 L. J. P. C. 161.

(d) *Imperial Credit Co. v. Colman* (*ubi supra*); *Parker v. McKenna* (*ubi supra*); see also *Morison v. Thompson*, L. R. 9 Q. B. 480; 48 L. J. Q. B. 215; *Williamson v. Hinc*, [1891] 1 Ch. 390; 60 L. J. Ch. 128; *Powell & Thomas v. Evans Jones & Co.*, [1905] 1 K. B. 11; 74 L. J. K. B. 115. And if such profits were made directly from property of the principal, of which the agent was trustee, so that they were an accretion to that property, the agent becomes a constructive trustee thereof so that they can be followed into investments made by him; but he is not a constructive trustee, but merely a debtor, in respect of secret profits otherwise made, as, e.g., a secret commission received from another party. *Burdick v. Garrick*, L. R. 5 Ch. 233; 39 L. J. Ch. 369; *Lister v. Stubbs*, 45 Ch. D. 1; 59 L. J. Ch. 570.

(e) *Parker v. McKenna* (*ubi supra*). *Transvaal Lands Co. v. New Belgium, etc., Co.*, [1914] 2 Ch. 488; 84 L. J. Ch. 94.

(f) [1901] 2 K. B. 504; 70 L. J. K. B. 978.

he was willing to buy at £2 1s. 5d. or to sell at £2 2s. 6d. But, since the sale and re-purchase were in one transaction, the jobber made a special price of £2 1s. 4½d. for the re-purchase, so that the stockbroker obtained them for 1s. 1½d. less than he would otherwise have done. It was held that, as the broker, in selling the shares, was acting for his client, to whom he had charged commission, and as the advantage that he gained on the re-purchase was due to the sale and re-purchase being the subject of one bargain, he must account to his client for the difference between the price for which he got the shares and the price which he would otherwise have paid.

If an agent accepts a bribe or secret commission from a party with whom he is dealing on behalf of his principal, the latter has the following remedies (g) :—

- i. He may rescind any contract in respect of which the bribe was given (h). And it is immaterial to inquire what effect the bribe may have had on the agent's mind (i).
- ii. He may refuse to pay the agent any commission in respect of the transaction or recover it if already paid (k). He cannot, however, refuse to pay commission to his agent on transactions in which he has acted honestly merely because there are other cases in which the agent, acting under the same agreement, has acted dishonestly and improperly (l).
- iii. He may recover from the agent or the person paying such bribe or commission the amount thereof, and any further damage which he has sustained in consequence thereof (m).
- iv. He may dismiss the agent without notice (n).

And the agent also incurs a liability to criminal proceedings under the Prevention of Corruption Acts, 1889 to 1916.

(g) See *Christoforides v. Terry*, [1924] A. C. 566; 93 L. J. K. B. 481.

(h) *Shipway v. Broadwood*, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360.

(i) *Id.* See also *Alexander v. Webber*, [1922] 1 K. B. 642; 91 L. J. K. B. 820.

(k) *Price v. Metropolitan, etc., Co.*, 28 T. L. R. 630; *Andrews v. Ramsay & Co.*, [1908] 2 K. B. 685; 72 L. J. K. B. 865.

(l) *Nitedale Tændstikfabrik v. Bruster*, [1906] 2 Ch. 671; 75 L. J. Ch. 798; see also *Hippesley v. Kneae*, [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5, in which an auctioneer, having charged (i) commission, (ii) out-of-pocket expenses for advertisements, etc., was held not to have forfeited his commission because he obtained a trade discount on advertisements, although he must account to his principal for such discount.

(m) *Mayor of Salford v. Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; *Grant v. Gold Exploration Syndicate*, [1900] 1 Q. B. 283; 69 L. J. Q. B. 150; *Hovenden v. Millhoff*, 83 L. T. 41; 16 T. L. R. 506.

(n) *Boston, etc., Fishing Co. v. Ansell*, 39 Ch. D. 389.



10. An agent may not publish or divulge any information obtained in the course of confidential employment, or use to his principal's detriment any knowledge surreptitiously obtained during his employment, or employ against his principal materials obtained only for his principal and in the course of his agency (o). Thus :—

In *Robb v. Green* (p), a manager of a business was restrained by injunction from using for his own purposes a list of his late employer's customers secretly copied during his employment.

In *Lamb v. Evans* (g), a canvasser who had been employed to obtain advertisements for a trade directory, and had for that purpose obtained blocks and other materials, was restrained from using these materials to assist a rival publication.

In *Measures Brothers v. Measures* (r), a former director of a company was ordered to deliver up lists of the names and addresses of the company's customers which for his own purposes he had compiled while he was director. In this case it was said that "no man who is in the employment of another is entitled to use, or even take a copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment".

### SECTION 3.—Rights of Agent against Principal

Except where a contract of agency is illegal (s) or is within the Gaming Act, 1892 (t), an agent may have against his principal the rights (1) to remuneration; (2) to an indemnity; and (8) to a lien.

1. Remuneration.—A person who claims to be remunerated for work which, as he alleges, was done by him as an agent must, in the first place, show that he was employed to do that work. If, for example, without any employment by the owner of property, a house agent introduces to him a person who, as a result of that introduction, purchases the property, the house agent is not thereby entitled to a commission (u). Similarly, if an agent is employed merely to let a house, he has no right to commission simply because a person introduced by him as a tenant subsequently buys the house (x).

(o) *Amber Size and Chemical Co. v. Menzel*, [1913] 2 Ch., at p. 245; 82 L. J. Ch. 573 (reviewing the authorities).

(p) [1895] 2 Q. B. 315; 64 L. J. Q. B. 593.

(q) [1893] 1 Ch. 218; 62 L. J. Ch. 104.

(r) [1910] 1 Ch. 336; 79 L. J. Ch. 707.

(s) *Atkins v. Jupp*, 2 C. P. D. 375; 46 L. J. C. P. 824; *Josephs v. Pebrer*, 3 B. & C. 639; 3 L. J. K. B. 102; *Harry Parker, Ltd. v. Mason*, [1940] 1 K. B. 590; 109 L. J. K. B. 985

(t) *Intc.*, p. 160.

(u) *White v. Lucas*, 3 T. L. R. 516.

(x) *Toulmin v. Millar*, 58 L. T. 96; 12 App. Cas. 746; 57 L. J. Q. B. 301.

Secondly, a person who claims remuneration as an agent must show a contract or usage to pay remuneration for the work in respect of which he claims it (*y*); and thirdly, he must show that all the conditions upon which such remuneration is payable have been fulfilled.

The mere fact that a person is employed as an agent gives him, as a rule, no right to remuneration, unless there is some bargain for remuneration, either express or to be inferred or implied from the circumstances (*z*). If no express stipulation has been made as to his remuneration, but it can be inferred that he was to be remunerated, he is entitled to reasonable remuneration if he does that which he was employed to do (*a*). Where, however, a professional agent, such as an auctioneer or broker, is employed in the ordinary course of his business without any express stipulation as to his remuneration, or the amount thereof, or the conditions upon which it is payable, there is an implied contract by the employer to pay the customary charges (*b*); and in this case the amount of the charges, and the conditions upon which they are payable, will depend upon the custom of the particular business (*c*).

Where express provision is made by the contract of agency as to the amount of the agent's remuneration, or the conditions upon which it is to be payable, the rights of the agent with respect thereto must be ascertained exclusively from the terms of the contract (*d*). Evidence of any valid (*e*) custom is, however, admissible to explain an express contract, or to incorporate a provision not inconsistent with its terms (*f*).

Accordingly, if a contract provides that the remuneration of an agent is to be payable only on the happening of a particular event or the accomplishment of a certain result, the agent is not entitled to *any* remuneration until that event has happened or that result has been accomplished. Thus, if it is provided that

(*y*) *Hall v. Gurney*, 2 C. & K. 644.

(*z*) *Reeve v. Reeve*, 1 F. & F. 280; 115 R. R. 911; *Foord v. Morley*, 1 F. & F. 496; *Barnett v. Isaacson*, 4 T. L. R. 645.

(*a*) *Taylor v. Brewer*, 1 M. & S. 290; 21 R. R. 831; *Jewry v. Busk*, 5 Taunt. 302; *Bryant v. Flight*, 5 M. & W. 114.

(*b*) *Miller v. Beale*, 27 W. R. 408; *Johnson v. Kearley*, [1908] 2 K. B., at p. 531; 77 L. J. K. B. 904.

(*c*) *Turner v. Reeve*, 17 T. L. R. 592; *Broad v. Thomas*, 7 Bing. 99; 9 L. J. C. P. 32; *Read v. Rann*, 10 B. & S. 488.

(*d*) *Moor Line v. Dreyfus*, [1918] 1 K. B. 89; 87 L. J. K. B. 126.

(*e*) *Gibson v. Crick*, 31 L. J. Ex. 304; 130 R. R. 125; *Curtis v. Nixon*, 24 L. T. 706.

(*f*) *Brown v. Byrne*, 3 E. & B. 708; 23 L. J. Q. B. 313; 97 R. R. 715; *Affrèleur Rénais v. Walford*. [1919] A. C. 801; 88 L. J. K. B. 861.

an agent is to receive a specified commission upon the "completion" of a sale (g), or if money is obtained upon certain specified terms (h) or out of money "obtained" or the price "paid" on a sale (i), he is neither entitled to recover that commission if the sale is not completed, or if the money is obtained upon other terms, or if no money is obtained as a result of the sale; nor (since the express contract excludes any implied contract (k)) can he recover upon a *quantum meruit* for any expenditure of money, time, or skill (l).

But, if the conditions upon which the remuneration of the agent was payable have been fulfilled, his right thereto is not lost merely because, without any default on his part, the principal receives no benefit. So, where an agent was to receive commission on "all goods bought" through him, it was held that he was entitled to commission on all orders obtained by him and accepted by his principal, although the latter was unable to execute them and so received no benefit (m). And, similarly, whenever an agent is employed to find a lender or purchaser, he is, in general, entitled to commission as soon as he has found a person able and willing to lend or purchase (n).

Where the remuneration of an agent is a commission payable upon transactions brought about by him, it is not sufficient for him to show that some act of his was a *causa sine qua non* of, or afforded an opportunity for, a transaction in respect of which he claims commission, but he must show that he was the *causa causans* or effective cause of such transaction (o). Thus, where a house agent was employed to find a purchaser or tenant for a house and found a tenant who, after three years' tenancy, purchased the house without any further intervention by the agent, it was held that the original introduction of the tenant was not the *causa causans* of the sale and that the agent was not entitled

(g) *Battams v. Tompkins*, 8 T. L. R. 707.

(h) *Mason v. Clifton*, 3 F. & F. 899; 130 R. R. 907.

(i) *Bull v. Price*, 7 Bing. 237; *Martin v. Tucker*, 1 T. L. R. 655; *Knight v. Gordon*, 39 T. L. R. 399; *Price, Davies & Co. v. Smith*, 45 T. L. R. 542.

(k) *Loft v. Outhwaite*, 10 T. L. R. 76.

(l) See *Howard v. Manx Isles S.S. Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233 (reviewing the authorities); *Bentall, Horsley and Baldry v. Vicary*, [1931] 1 K. B. 233; 100 L. J. K. B. 201.

(m) *Lockwood v. Levick*, 8 C. B. (N.S.) 603; 29 L. J. C. P. 340.

(n) *Green v. Lucas*, 33 L. T. 581; *Fisher v. Drewett*, 48 L. J. Q. B. 32; 39 L. T. 253; *Re Sovereign Life Assurance Co. (Salter's Claim)*, 8 T. L. R. 602; *Passingham v. King*, 14 T. L. R. 392; *James v. Smith* (1921) (unreported, but cited in *Martin v. Perry and Daw*, [1931] 2 K. B. 810).

(o) *Tribe v. Taylor*, 1 C. P. D. 505; *Miller & Co. v. Radford*, 19 T. L. R. 575; *Nightingale v. Parsons*, [1914] 2 K. B. 621; 83 L. J. K. B. 742; *Howard, Houldred & Partners v. Manx S.S. Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233.

to commission upon the sale (*p*). But if an agent is the *causa causans* of a transaction he is entitled to his commission, even though the transaction is not actually completed by him or during his employment as agent (*q*). And an agent may by express agreement be entitled to commission upon transactions which were not even commenced during his employment (*r*). Thus, where an employer agreed to pay commission "upon all orders executed by us and paid for by customers arising from your introduction", it was held that the agent was entitled to commission on orders received after his dismissal. But, *prima facie*, the agent is not entitled to commission after the termination of his employment (*s*).

An agent has no right of remuneration in respect of any services from which, in consequence of his negligence or other breach of duty, the principal receives no benefit (*t*). If, however, the breach does not go to the whole contract the principal must pay commission in respect of any benefit which he has received. Thus, in *Keppel v. Wheeler* (*u*), it was held that, since the breach did not go to the whole contract and the agents had acted in good faith, believing that their duties were at an end, the principal must pay the commission on the sum of £6,150 of which he had the benefit.

If a principal, in breach of any express or implied term of the contract of agency (*w*), by his own act or default prevents the agent from earning his remuneration, the agent may maintain an action for *damages*, the measure of which will, according to the circumstances, be either the amount of the remuneration

(*p*) *Nightingale v. Parsons* (*ubi supra*).

(*q*) *Green v. Bartlett*, 14 C. B. (N.S.) 681; 32 L. J. C. P. 261; *Mansell v. Clements*, L. R. 9 C. P. 189; *Burchell v. Gouvie, etc., Collieries*, [1910] A. C. 614; 80 L. J. P. C. 41; *Bow's Emporium, Ltd. v. Brett & Co., Ltd.*, 44 T. L. R. 194.

(*r*) *Bilbee v. Hassé*, 5 T. L. R. 877; see also *Solomon v. Brownfield*, 12 T. L. R. 289; *Wilson v. Harper*, [1908] 2 Ch. 870; 77 L. J. Ch. 607; *Levy v. Goldhill*, [1917] 2 Ch. 297; 86 L. J. Ch. 698.

(*s*) *Marshall v. Glanville*, [1917] 2 K. B. 87; 86 L. J. K. B. 767; and see *Kelly v. Croft*, 14 T. L. R. 348; *Barrett v. Gilmour*, 17 T. L. R. 292; *Gerahty v. Baines*, 19 T. L. R. 454; *Cramb v. Goodwin*, 35 T. L. R. 477.

(*t*) *Hammond v. Holiday*, 1 C. & P. 384; *Dalton v. Iron*, 4 C. & P. 289; *Hill v. Featherstonhaugh*, 7 Bing. 569; 33 R. R. 576; *Hopkinson v. Smith*, 1 Bing. 18.

(*u*) *Ante*, p. 457.

(*w*) *French & Co., Ltd. v. Leeston Shipping Co., Ltd.*, [1922] 1 A. C. 451;  
Q1 T. T. K. R. AKK

which the agent would have earned or the value of the chance of earning it (*y*).

Where an agent is under a contractual obligation to do specific work for his principal the contract must necessarily contain an implied term that the principal will do nothing to prevent the agent from doing the work which the contract binds him to do, but no such term is implied where an agent is merely promised commission if he completes a particular transaction; accordingly, an owner of property who merely promises commission to an agent if he sells it, is not, in the absence of any special agreement to the contrary, prevented from disposing of the property himself or through another agent (*z*).

Estate agents are frequently employed to sell a house on the condition that they will be paid commission on introducing a person "able, ready and willing" to purchase. This means that they will be entitled to commission only if they introduce a person who signs a binding contract (*a*) and the person introduced is able to complete, i.e., able to find the necessary money to perform his obligations (*b*); and he does not sign a binding contract if he signs "subject to contract" or "subject to survey" (*c*).

**2. Indemnity.**—An agent is entitled to be indemnified by his principal against all losses, liabilities and expenses incurred by him in executing the orders of his principal (*d*), unless incurred

(*y*) *Simpson v. Lamb*, 17 C. B. 603; 25 L. J. C. P. 113; 104 R. R. 806; *Prickett v. Badger*, 1 C. B. (n.s.) 296; 26 L. J. C. P. 33; 107 R. R. 668; *George Trollope & Sons v. Martyn Brothers*, [1934] 2 K. B. 486; 103 L. J. K. B. 634; *George Trollope & Sons v. Caplan*, [1936] 2 K. B. 382; 105 L. J. K. B. 819.

(*z*) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A. C. 108; 110 L. J. K. B. 181, overruling *Trollope & Sons v. Martyn Brothers*, [1934] 2 K. B. 486, and *Trollope & Sons v. Caplan*, [1936] 2 K. B. 382. Where, however, the plaintiffs, though described in an agreement with the defendants as their "sole selling agents", were in fact not agents but purchasers to whom the defendants sold their goods for the purposes of distribution and re-sale, it was held to be a breach of the agreement for the defendants to sell their goods otherwise than to the plaintiffs: *Lamb & Sons v. Goring Buck Co*, [1932] 1 K. B. 710; 101 L. J. K. B. 214.

(*a*) *Luxor (Eastbourne), Ltd. v. Cooper* (ubi supra); *McCallum v. Hicks*, [1950] W. N. 190, 66 T. L. R. 747.

(*b*) *Poole v. Clarke & Co*, [1915] 2 All E. R. 445.

(*c*) *Graham and Scott (Southgate) v. Oxlade*, [1950] W. N. 160; 66 T. L. R. 808; *Reed v. Goody*, [1950] W. N. 204; 66 T. L. R. 918.

(*d*) *Thacker v. Hardy*, 11 Q. B. D., at p. 678; 48 L. J. Q. B. 289; *Re Fatima Corporation*, [1914] 2 Ch., at p. 382; 84 L. J. Ch. 48; *Adams v. Morgan & Co.*, [1924] 1 K. B. 751; 93 L. J. K. B. 382.

through conduct on his own part which is known by him to be illegal (e) or by reason of his own default or breach of duty (f).

8. *Lien*.—Every agent has a possessory lien on the goods of his principal in respect of any claims for his own remuneration and for expenses, losses and liabilities properly incurred in the course of his agency, unless he received the goods under an express agreement or for a special purpose inconsistent with the right of lien. The lien of an agent is a *particular* lien only, unless by express agreement or custom he has a general lien. Factors, wharfingers, stockbrokers, bankers, solicitors, and in some cases, insurance brokers, have a general lien (g).

#### SECTION 4.—*Relations between Principal and Third Parties*

1. *Rights of principal against third parties*.—The general rule is that a principal may sue in respect of all transactions effected with his authority or subsequently ratified by him, unless his rights are excluded by the terms of a particular contract. This rule applies although the agent contracts personally, or does not disclose the name or existence of his principal, unless, in the latter case, evidence of the existence of a principal would contradict the express terms of the contract. But it does not apply to contracts by deed, nor to bills of exchange, promissory notes and cheques, and there are some cases in which the other contracting party may elect whether he will make the principal or the agent liable. These exceptional cases to which the general rule does not apply will be considered later (h).

2. *Liability of principal to third parties*.—Subject to the same exceptions a principal is liable to third parties for any transaction effected by another person on his behalf if *either* such person had express or implied authority to effect such transaction on his behalf, *or* he has subsequently ratified the transaction, *or* he is estopped from denying that such person had authority to effect the transaction on his behalf (i).

*Express authority* may, as a rule, be proved either by evidence that it was expressly given or by evidence of acts and

(e) *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

(f) *Johnson v. Kearley*, [1908] 2 K. B. 514; 77 L. J. K. B. 904.

(g) For solicitors, see *post*, p. 493, and for the authorities upon the rest of this paragraph, see *post*, Part III, Chapter V, Section 2, Sub-section 1.

(h) See Section 6, *post*, p. 485.

(i) See *Paquin, Ltd. v. Beauclerk*, [1906] A. C., at p. 166; 75 L. J. K. B. 395.

conduct from which it may be inferred (*k*). Where, however, an agent executes a deed, express authority by deed must be proved (*l*).

*Implied authority.*—It has been already pointed out that, subject to his express instructions, every agent has implied authority (i) to do all acts necessary for or incidental to the execution of his agency; and (ii) to follow the ordinary course of business and any reasonable trade usage (*m*).

Accordingly, when one person appoints another to act as his agent in any capacity, he gives him an apparent or ostensible (*n*) authority to do everything within the scope of the authority which, by implication of law, belongs to an agent of that particular character; and while as between the principal and the agent the implied authority of the agent can be limited by the express instructions of the principal, no third person dealing in good faith with the agent is bound by any limitations of the agent's authority of which he had no actual notice, so that, as regards such third persons, the apparent or ostensible authority is the real authority and binds the principal (*o*).

The scope of the implied or ostensible authority of an agent must necessarily vary according to the nature of his agency. There is, however, an essential distinction between general and particular agents.

A *general agent* is an agent who has authority to act for his principal in all matters (when he is sometimes called a universal agent), or in the management of a trade or business carried on by his principal (*p*), or who is employed in the ordinary course of his own business as an agent (*e.g.*, a stockbroker who is employed to buy or sell shares on the Stock Exchange).

A *particular agent* is an agent with a limited authority to carry out some particular transaction not in the course of his own business as agent, or to act in some particular capacity not involving any general powers of management (*q*).

(*k*) *Pole v. Leask*, 38 L. J. Ch., at p. 156; 143 R. R. 322.

(*l*) *Berkeley v. Hardy*, 5 B. & C. 355; 4 L. J. K. B. 184; 29 R. R. 261. But, in the case of partners, it has been held sufficient to bind all if a deed is executed by one in the presence and with the oral authority of the others: *Ball v. Dunsterville*, 4 T. R. 813; 2 R. R. 894; *Durn v. Burn*, 3 Ves. 578.

(*m*) See *ante*, pp. 451-5.

(*n*) The expressions "apparent" and "ostensible" have the same meaning.

(*o*) See *Lloyd v. Grace, Smith & Co.*, [1912] A. C., at p. 740; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547; *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K. B., at pp. 317, 318; 97 L. J. K. B. 25.

(*p*) See *Brady v. Todd*, 9 C. B. (N.S.) 592; 30 L. J. C. P. 223.

(*q*) As, for instance, a stationmaster, see *Cox v. Midland Ry.*, 3 Ex. 268; 18 L. J. Ex. 65.

Every agent has implied and ostensible authority to do what is usual and necessary (*r*); but no agent has implied or ostensible authority to do what is unnecessary, or, save in certain cases of necessity, what is unusual or outside the apparent scope of his employment.

Thus an agent who has authority to enter into a binding contract has implied authority to sign a memorandum thereof where such memorandum is required by statute (*s*). But a solicitor who merely has instructions to prepare a draft contract and send it to the purchaser for perusal and approval has no implied authority to sign a memorandum of a contract (*t*). And authority to make contracts does not give an agent implied authority to cancel or vary contracts made by him (*u*).

Again, an agent who is employed to find a purchaser for a house has implied authority to describe it and make representations as to its value (*a*), and an agent who is employed to sell a house has implied authority to make a binding contract for its sale (*b*).

But an agent who is employed merely to find a purchaser has no implied authority to sign an agreement for sale (*c*). And a person who is employed merely in the capacity of a rent collector has no implied authority to receive notice to quit (*d*) or to distrain (*e*). And the local agent of an insurance company, whose duties are merely to receive premiums or proposals, has no implied authority to extend the time for payment of premiums or to contract to grant policies on behalf of the company (*f*). And a *stationmaster*, whose duties relate merely to matters connected with transport, has no implied authority to pledge the

(*r*) *Dingle v. Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 148.

(*a*) *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337; 180 R. R. 446; 7 L. T. 97; *North v. Loomes*, [1919] 1 Ch. 878; 88 L. J. Ch. 217; *Koenigsblatt v. Sweet* [1928] 2 Ch. 314; 92 L. J. Ch. 598.

(*t*) *Smith v. Webster*, 8 Ch. D. 49; 45 L. J. Ch. 528.

(*u*) *Xenos v. Wickham*, L. R. 2 H. L. 286; 36 L. J. C. P. 313.

(*a*) *Mullens v. Miller*, 22 Ch. D. 194; 52 L. J. Ch. 380.

(*b*) *Rosenbaum v. Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569; but see *Keen v. Mear*, post, p. 471.

(*c*) *Hamer v. Sharp*, 19 Eq. 208; 44 L. J. Ch. 53; *Chadburn v. Moore*, 61 L. J. Ch. 674.

(*d*) *Pease v. Boulter*, 2 F. & F. 183; 121 R. R. 782.

(*e*) *Ward v. Shew*, 9 Bing. 608; 2 L. J. C. P. 53.

(*f*) *Acey v. Fernie*, 7 M. & W. 151; 10 L. J. Ex. 9; *Linford v. Provincial, etc., Ins. Co.*, 84 Beav. 291; 145 R. R. 516; *Newsholme Brothers v. Road Transport, etc., Insurance Co.*, [1929] 2 K. B., at pp. 362, 377; 98 L. J. K. B. 751. See, however, *Murfit v. Royal Insurance Co.*, 38 T. L. R. 384, where it was held that the practice of giving oral "cover" was so well established in insurance business that an agent had implied authority to give it.



credit of a railway company for medical attendance to an injured passenger (g).

It should particularly be noted that an agent authorised to sell goods has no implied authority to receive the purchase-money (h), and when he is authorised to receive payment he has *prima facie* authority only to receive it in the ordinary course of business and in cash (i); and if he has authority to receive payment by cheque, he has no implied authority to pay into his private account cheques made payable to his principal (k).

A *general agent* has implied or ostensible authority to do all acts which are within the authority usually entrusted to an agent of that character.

Accordingly an agent employed to manage a trade or business has implied authority to do whatever is incidental to the ordinary conduct of such trade or business. Thus the manager of a beer-house has implied authority to buy whatever would usually be dealt in at such a house (l), and the manager of a business to which the drawing and accepting of bills of exchange is incidental has implied authority to draw and accept them in the name in which the business is carried on (m). So also the *general manager* of a railway company has implied authority to pledge the company's credit for medical attendance for a *servant of the company* (n). So also the manager of an estate has implied authority to grant usual and customary leases, and to give and receive notices to quit, and to make agreements with tenants with regard to the management of the estate (o).

(g) *Cox v. Midland Ry.*, *ante*, p. 468.

(h) *Butwick v. Grant*, [1924] 2 K. B. 483; 93 L. J. K. B. 972.

(i) *Ante*, p. 455; see also *Sykes v. Gilks*, 5 M. & W. 645; 9 L. J. Ex. 106.

(k) *Underwood v. Bank of Liverpool*, [1924] 1 K. B. 775; 93 L. J. K. B. 690.

(l) *Watteau v. Fenwick*, [1893] 1 Q. B. 346. In this case the defendants, who were owners of a beer-house, appointed A as their manager. The licence was in A's name, which was also over the door. A was forbidden to buy certain goods, which were to be supplied by the defendants themselves. In breach of his instructions A bought such goods from the plaintiff for use in the beer-house and credit was given to him personally by the plaintiff, who knew nothing of the defendants. Subsequently the plaintiff discovered that the defendants were A's principals, and sued them for the price of the goods:—*Held*, that although the defendants had not held out A as their agent (see *post*, p. 24), they were liable for the price of the goods, since their purchase was within the authority usually conferred upon an agent of A's character.

(m) *Edmunds v. Bushell*, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(n) *Walker v. Great Western Ry.*, L. R. 2 Ex. 228; 36 L. J. Ex. 123. Compare *Cor v. Midland Ry.* (*ante*, p. 468).

(o) *Jones v. Phipps*, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; *Re Pearson*, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878.

Upon the same principle a general agent employed in the ordinary course of his business as such has implied authority to act according to the general practice and usage of the particular business which he carries on or the particular market in which it is carried on, unless such practice or usage is illegal, or is unreasonable and was unknown to his principal when employing him. Thus, if an agent is authorised to sell goods, and it is customary in the trade to warrant that particular class of goods or to sell them on credit, he has implied authority to warrant them (p) or to sell them on credit. So also a broker who is employed upon a particular market or exchange has implied authority to act in accordance with all reasonable usages of such market or exchange (q). But the mere employment of an estate agent confers on him no implied authority to make a contract; he is implied merely to find persons to negotiate with the owner. If, however, he is instructed to sell at a certain price, he has implied authority to make a binding contract and sign an agreement; but his authority is limited to signing an open contract, not a contract with any special conditions (r).

Where an agent, whether particular or general, is clothed with ostensible authority, no private instructions given by his principal, but unknown to the persons with whom he deals, can prevent acts within the scope of his ostensible authority from binding his principal (s). Thus, where A, having a dispute with B, wrote to B as follows: "I have seen E and . . . authorised him to come to some amicable arrangement in the matter", and E settled the dispute by agreeing that B should pay £50, it was held that A was bound by this agreement, although he had given private instructions to E not to settle for less than £100 (t).

But if a person deals with an agent whose authority is to his knowledge limited, he must either ascertain its extent or he deals with the agent at his own risk, for if the authority is exceeded the principal is not liable (u). Accordingly, a person dealing with

(p) *Dingle v. Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 143; 121 R. R. 424.

(q) *Ante*, p. 454.

(r) *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 518.

(s) *Beaufort (Duke of) v. Neeld*, 12 Cl. & Fin., at p. 274; *National Bolivian Navigation Co. v. Wilson*, 5 A. C., at p. 209; *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K. B., at p. 818; 97 L. J. K. B. 25.

(t) *Trickett v. Tomlinson*, 18 C. B. (N.S.) 668; 7 L. T. 678. See also *Rainbow v. Howkins* (post, p. 489).

(u) *Chapleo v. Brunswick, etc., Society*, 6 Q. B. D., at p. 705; 50 L. J. Q. B. 872; *Russo-Chinese Bank v. Li Yau Sam*, [1910] A. C. 174; 79 L. J. P. C. 60.

an agent whom he knows to be acting under a power of attorney has notice of the terms of the power (a).

And a person who receives from an agent the money or property of his principal with the knowledge that it is being paid or transferred in breach of the agent's duty to his principal is bound to account for it to the principal (b).

Thus, in *Reckitt v. Barnett, Pembroke & Slater* (c), A gave to B a power of attorney to manage his affairs while he was abroad. B lodged the power of attorney with A's bank in order to enable himself to draw cheques on A's account. The bank having objected that the power of attorney did not authorise the drawing of such cheques, A supplemented it by a letter stating that he wished it to cover the drawing of cheques by B "without restriction". B, without the knowledge of A and in order to pay his own private debt to C, gave to C a cheque drawn on A's account, signing it as A's attorney. The bank having paid the cheque, C was sued by A to recover the amount paid. It was held (i) that, since C knew that B was using A's money for his own purposes he could not retain it unless B had actual or express authority so to use it, and (ii) that the power of attorney and the letter, in spite of the words "without restriction", gave B no express authority to draw cheques for any purposes other than those of A's business.

Lastly, it must particularly be noticed that, if a transaction effected by an agent is within his actual or ostensible authority, the principal is bound, even though the agent acted fraudulently in furtherance of his own interest (d), and even though the fraud was committed by means of a forgery (e).

(a) *Jacobs v. Morris*, [1902] 1 Ch. 816; 71 L. J. Ch. 863. See also *Reckitt v. Barnett, Pembroke & Slater*, [1929] A. C. 176; 98 L. J. K. B. 186.

(b) *John v. Dodwell*, [1918] A. C. 568; 87 L. J. P. C. 92. Compare *Corporation Agencies, Ltd. v. Home Bank of Canada*, [1927] A. C. 318; 96 L. J. P. C. 68.

(c) *Ubi supra*; see also *Midland Bank v. Reckitt*, [1938] A. C. 1 (post, Part III, Chapter VI, Section 2).

(d) *Hambro v. Burnand & Co*, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 808; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 517.

(e) *Uxbridge Permanent, etc., Building Society v. Pickard*, [1939] 2 K. B. 248; 108 L. J. K. B. 757. Compare, however, *Ruben v. Great Fingall, etc., Co*, [1906] A. C. 439; 75 L. J. Ch. 843. In that case the plaintiffs advanced money to the secretary of a company on the security of a share certificate issued to them by him. The certificate bore the seal of the company and purported to be signed by two of the directors. The seal had been fraudulently affixed by the secretary who had also forged the signatures of the directors. *Held*, that the company was not liable, because the secretary could have no ostensible authority to put forward as the deed of the company something which was a mere nullity.

*Agency of necessity.*—In some exceptional cases the implied authority of an agent may be increased, or the relationship of principal and agent may be created, by circumstances of necessity. The chief instance of an agent of necessity is a shipmaster. While other agents have no implied authority to borrow money on behalf of their principals (f), a shipmaster may, if he cannot communicate with his owners, borrow money upon their credit for necessities for the ship. A shipmaster may also, in cases of necessity, when communication with his principal is impossible, exercise many other extraordinary powers. Thus he may, in such circumstances, sell or pledge the ship or cargo, or sell perishable goods which cannot be carried to their destination in a marketable condition, or incur expenditure for the safety of goods and charge their owner with such expenses.

The Courts are not inclined to extend this principle of agency of necessity (g); but it has been held that a similar right to sell perishable goods belongs to carriers by land (h), and to a vendor who, owing to war conditions, cannot deliver such goods to a purchaser abroad (i), and that the right to incur expenditure for the safety of goods belongs to carriers by land (k). In certain cases also a bailee of property may become an agent of necessity for the owners (l).

A well-established instance of agency of necessity occurs, however, where a wife is deserted by her husband, or through his conduct is compelled to leave him, in which cases, if he makes no provision for her, she has implied authority to bind him by her contracts for necessities (m).

*Ratification.*—The doctrine of ratification, as expressed in the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, is that where A does any act or enters into any transaction professedly on behalf of B, but either has no authority from B or exceeds the authority given to him by B, the subsequent ratification by B of such act or transaction is equivalent to an antecedent authorisation. The principle applies both to

(f) *Hawtayne v. Bourne*, 7 M. & W. 595; 10 L. J. Ex. 224.

(g) See, e.g., *Hawtayne v. Bourne* (*ubi supra*); *Gwiliham v. Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; and the judgment of Scrutton, L. J., in *Jebara v. Ottoman Bank*, [1927] 2 K. B., at pp. 270, 271; 96 L. J. K. B. 581. See also *Sachs v. Miklos*, [1948] 2 K. B. 28; [1948] L. J. R. 1012.

(h) *Sims v. Midland Ry.*, [1913] 1 K. B. 108; 82 L. J. K. B. 67; *Springer v. Great Western Ry.*, [1921] 1 K. B. 257; 89 L. J. K. B. 1010.

(i) *Prager v. Blatspiel*, [1924] 1 K. B. 566; 98 L. J. K. B. 410.

(k) *Great Northern Ry. v. Swaffield*, L. R. 9 Ex. 182; 48 L. J. Ex. 89.

(l) *Goldman v. Hill*, [1919] 1 K. B. 448; see *post*, Part III, Chapter III, Section 1.

(m) *Post*, p. 491.

contracts and to torts (n), but not to any act or transaction which is void or illegal, or to a contract which could not at the time of the ratification be made by the person purporting to ratify it (o). Thus, a forged signature cannot be ratified (p), nor can a company ratify a contract which is beyond the powers conferred by its memorandum of association (q).

Ratification of a contract is, however, possible only when A contracts as agent and on behalf of a principal who is in existence and in contemplation at the time of the contract (r). Thus, if the promoters of a company make a contract on its behalf before its incorporation, the company cannot upon incorporation ratify that contract (s), but must make a new contract on the same terms (t). Nor, when a contract is made by A, professedly as principal and without having at the time any principal, but having an undisclosed intention or hope of inducing B to adopt it, can it be subsequently ratified by B (u). But it is not necessary that the identity of the principal should be known to the agent when he contracts. Thus, a person may act on behalf of the owner of particular property, though unascertained and unknown to him, and the owner, when ascertained, may ratify the transaction (a).

The ratification of a contract must take place within a reasonable time after its formation and before the time for commencement of its performance by the other party (b). And, where it is essential to the validity of an act that it should be done at or before a particular time, it cannot be ratified after that time so as to affect third parties. Thus, notice of intention to exercise an option cannot be ratified after the option has expired (c), and notice to quit cannot be ratified after the expiration

(n) *Bird v. Brown*, 4 Ex. 876; 19 L. J. Ex. 154.

(o) *Banque Jacques-Cartier v. Banque d'Epargne*, 13 A. C., at p. 118; 57 I. J. P. C. 42.

(p) *Brook v. Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(q) *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 188; but a company may ratify a contract made by its directors in excess of their powers provided that it is not *ultra vires* the company (*Grant v. United Switchback, etc., Co.*, 40 Ch. D. 135; 58 L. J. Ch. 211).

(r) *Keighley, Maxted & Co. v. Durant*, [1901] A. C. 240; 70 L. J. K. B. 662.

(s) *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16.

(t) *Howard v. Patent Ivory Co.*, 88 Ch. D. 156; 57 L. J. Ch. 878.

(u) *Keighley, Maxted & Co. v. Durant* (*ubi supra*).

(a) *Foster v. Bates*, 12 M. & W. 226; 18 L. J. Ex. 88; *Lyell v. Kennedy*, 14 A. C. 437; 59 L. J. Q. B. 268.

(b) *Metropolitan Asylums Board v. Kingham*, 6 T. L. R. 217.

(c) *Dibbins v. Dibbins*, [1896] 2 Ch. 848; 65 L. J. Ch. 724.

of the time for giving notice (d). Ratification cannot, moreover, divest an estate which has once vested, nor render unlawful an act which was lawful at the time of its performance (e).

Subject to the foregoing limitations a ratification relates back to the date of the act or transaction which is ratified and produces the same consequences as if at that date it had been authorised by the person ratifying it (f). Thus, where an offer made by A has been accepted by B on behalf of C, the acceptance may be ratified by C, although he has notice that A has withdrawn his offer (g).

Ratification of a deed can be effected only by deed (h), but in other cases a ratification may be in any form and may be express or inferred. Thus a written contract may be ratified orally, even if it be a contract which is not enforceable unless evidenced by writing (i). A ratification of an act or transaction may be inferred whenever the conduct of the person on whose behalf it was done or effected is such as to indicate an intention by him to adopt or recognise it. Thus—

In *Hilbery v. Hatton* (k), there was held to be evidence of ratification where a principal gave instructions to his agent to use in a particular manner a ship which the agent had purchased without authority.

In *Keay v. Fenwick* (l), there was held to be evidence of ratification where co-owners of a ship sold by their agent without their authority received and divided between themselves the purchase-money.

Where, however, under a contract with an agent acting in excess of his authority, work has been done upon the property of his principal, a ratification cannot be inferred merely because the principal resumes possession of his property and disposes of it (m).

Ratification of part of a transaction operates as ratification of

(d) *Doe d. Lyster v. Goodwin*, 2 Q. B. 143; 10 L. J. Q. B. 275.

(e) *Bird v. Brown*, 4 Ex., at p. 798; 19 L. J. Ex. 154.

(f) *Wilson v. Tuman*, 6 Man. & G. 286; 12 L. J. C. P. 806; 64 R. R. 770; *Koenigsblatt v. Sweet*, [1928] 2 Ch., at p. 325; 92 L. J. Ch. 598.

(g) *Bolton Partners v. Lambert*, 41 Ch. D. 295; 58 L. J. Ch. 425; *Re Portuguese Copper Mines, Ltd.*, 45 Ch. D. 16; *Re Tiedemann*, [1899] 2 Q. B. 66; 68 L. J. Q. B. 252. See, however, *Fleming v. Bank of New Zealand*, [1900] A. C. 577; 69 L. J. P. C. 120.

(h) *Hunter v. Parker*, 7 M. & W. 322; 10 L. J. Ex. 281; *Oxford Corporation v. Crow*, [1898] 8 Ch. 535.

(i) *Maclean v. Dunn*, 4 Bing. 722; 6 L. J. C. P. 184; *Somes v. Spencer*, 1 Dow. & Ry. K. B. 32.

(k) 2 H. & C. 822; 38 L. J. Ex. 190.

(l) 1 C. P. D. 745.

(m) *Forman v. The Liddesdale*, [1900] A. C. 190; 69 L. J. P. C. 44.

the whole (n): a person cannot, therefore, accept the benefits of a transaction unless he also adopts the burdens thereof (o).

No one can, however, be deemed to have ratified any act or transaction done or entered into without his authority, unless at the time of the ratification he had full knowledge of what that act or transaction was, or his adoption of it was so unqualified that the inference may properly be drawn that he intended to take upon himself the responsibility of such act or transaction whatever it might be (p); but it is not necessary that he should be aware of the legal effect of the act or transaction (q).

*Estoppel by "holding out".*—Lastly, a person may, as a result of the principle of estoppel, be liable for acts and transactions done without any express or implied authority from him and not ratified by him. Estoppel is a rule of evidence by which a person may be prevented from giving evidence to contradict some particular fact. And whenever one person, by words or conduct, wilfully induces another to believe in the existence of any state of things and to act on such belief, he is estopped from contesting, as against such other person, the existence of that state of things. Accordingly, whenever A is "held out" by B as his agent, i.e., is either represented by B to be his agent, or is permitted or authorised by B to exercise an authority which may reasonably be assumed to be a real authority, B is estopped, as against persons dealing in good faith with A in reliance upon such "holding out", from contesting the existence or extent of the authority which he has represented A to possess or allowed him to exercise (s).

The doctrine of "holding out" applies only (i) "where the holding out is something other than the truth" (t); (ii) when the person dealing with A knows of the existence of B (u); (iii) when the holding out is to the particular individual who says

(n) *Hovl v. Pack*, 7 East 164; *Keay v. Fenwick*, 1 C. P. D., at p. 758.

(o) *Hovl v. Pack* (ubi supra); *Bristow v. Whitmore*, 9 H. L. C. 391; 31 L. J. Ch. 467.

(p) *Marsh v. Joseph*, [1897] 1 Ch., at p. 238; 66 L. J. Ch. 128; see also *The Bonita*, 30 L. J. P. M. & A. 145.

(q) *Powell v. Smith*, L. R. 18 Eq. 85; 41 L. J. Ch. 784.

(s) *Smith v. M'Guire*, 8 H. & N. 554; 27 L. J. Ex. 465. Note that the doctrine of "holding out" applies not only to the existence of agency, but to the extent of an agent's authority: *id.*; and see *Brady v. Todd*, 9 C. B. (N.S.), at p. 604; 30 L. J. C. P. 228.

(t) *Chapleo v. Brunswick Building Society*, 6 Q. B. D., at p. 706; 50 L. J. Q. B. 372.

(u) *Watteau v. Fenwick*, [1898] 1 Q. B., at p. 349; see *ante*, p. 470.

he relied on it, or is under such circumstances of publicity as to justify the inference that he knew of it and acted on it (a).

Where a person has been deceived by an agent into believing that he may safely buy or otherwise deal with goods, he must in general bear any loss which he incurs thereby, unless he can prove that he was misled by the conduct of the true owner. Thus, if A, who has not been held out by his principal to C as having authority to sell goods to C, fraudulently sells to C goods to which he has access, his principal can recover from C the goods or their value (b). But if A has been clothed with the apparent ownership and right of disposition and has thus been held out as being the owner of or having authority to dispose of the goods of his principal, the latter must bear the loss occasioned by any fraudulent disposition of the goods by A in the exercise of his apparent authority (c).

Whether in any particular case one person has been held out as the agent of another is an inference of fact, provided that there is any evidence that can support such an inference (d). Thus if B has on several occasions permitted A to buy from C goods for which he has habitually paid C, and A fraudulently and without authority obtains goods from C on B's credit but for his own use, it is a question of fact whether B has so conducted himself as to make C believe that A was his agent and to deal with A on that footing (e).

A leading case on "holding out" is that of *Wright v. Glyn*. Here the defendant employed A as his coachman under an agreement whereby A was to be paid a weekly sum to include the cost of foraging the defendant's horses. Forage was for several months bought by A from the plaintiff, who, not being told by A of the arrangement, gave credit to the defendant, the latter not knowing from whom the forage was bought and merely paying A the agreed weekly sum. *Held*, that there was no

(a) *Farquharson Brothers v. King*, [1902] A. C., at p. 341; 71 L. J. Q. B. 667.

(b) *Farquharson v. King*, [1902] A. C. 325; 71 L. J. K. B. 667.

(c) *Fry v. Smellie*, [1912] 8 K. B. 382; 81 L. J. K. B. 1008. In the case of goods entrusted to a mercantile agent the Common Law responsibility has been extended by the Factors Acts which will be considered later. See *post*, Part III, Chapter V, Section I.

(d) *Wright v. Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497; see also *Chapleo v. Brunswick Building Society* (*ubi supra*); *Spooner v. Browning*, [1898] 1 Q. B., at p. 536; 67 L. J. Q. B. 389.

(e) *Gillman v. Robinson*, 1 C. & P. 642; 28 R. R. 795; *Summers v. Solomon*, 7 E. & B. 878; 26 L. J. Q. B. 301; *Cornish v. Abington*, 4 H. & N. 549; 28 L. J. Ex. 262.



evidence of a holding out by the defendant of A as having authority to pledge his credit for forage (f).

It has also been held that the fact that A is the manager of a tied public-house is no evidence that he has been held out as having authority to buy spirits from persons other than those to whom the public-house is tied (g).

*Notice to agent.*—Where knowledge is acquired by an agent of any facts or circumstances material to the transaction or business in respect of which he is employed, the principal is, as a general rule, deemed to have notice of such facts or circumstances, provided that the knowledge was acquired by the agent in the course of his employment in the transaction (h), and the facts or circumstances are of such a nature that it is the duty of the agent to communicate them to him (i).

Thus, in *Wing v. Harvey* (k), the plaintiff was the assignee of a life policy which was subject to a condition making it void if the assured went beyond the limits of Europe without licence. In paying the premium to a local agent at the place where the policy was effected the plaintiff informed him that the assured was in Canada. The agent stated that this would not avoid the policy and continued to receive the premiums until the assured died. Held, that since the agent was appointed for the purpose of receiving premiums it was his duty to communicate to the directors the circumstances under which they were received, and that the company therefore had notice of those circumstances and could not insist on the forfeiture.

The knowledge of directors of a company is in ordinary circumstances the knowledge of a company: but the knowledge of a minor official of a company is the knowledge of a company only if the thing of which knowledge is predicated is a thing within the ordinary domain of his duties (l) or expressly delegated to him (m).

And where a person is an official of two companies, knowledge which he acquires on behalf of one company does not operate

(f) *Ubi supra*. It was also held that the mere relationship of master and coachman did not of itself involve as a matter of law ostensible authority to pledge his master's credit for forage.

(g) *Daun v. Simmins*, 41 L. T. 783; 18 L. J. C. P. 943.

(h) *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424; 51 L. J. Q. B. 177; *Wells v. Smith*, [1914] 3 K. B. at p. 725; 83 L. J. K. B. 1614.

(i) *Blackburn v. Vigors*, 12 App. Cas. 531; 57 L. J. Q. B. 114.

(k) 5 De G. M. & G. 265; 23 L. J. Ch. 511.

(l) *Houghton & Co. v. Nothard, Lowe & Wills, Ltd.*, [1928] A. C. 1; 97 L. J. K. B. 76.

(m) *Evans v. Employers, etc., Association, Ltd.*, [1936] 1 K. B. 505; 105 L. J. K. B. 141.

as notice to the other company unless it was his duty to communicate it to such other company (n).

Nor does the knowledge of an agent constitute knowledge of the principal where the agent is a party to the commission of a fraud upon his principal, the success of which requires the concealment of the facts or circumstances in question (o).

### SECTION 5.—*Relations between Agents and Third Persons*

Here two classes of cases must be distinguished—namely, (1) where the agent is acting without authority; and (2) where he is acting with authority.

1. **Agent acting without authority.**—If an agent contracts for a fictitious or non-existing principal, or a person without contractual capacity, he himself is personally liable upon the contract (p).

If he innocently misrepresents his authority, he may be sued *ex contractu* for damages for the breach of an *implied warranty of authority*. This liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not, and whether he never had authority or his original authority had ceased by reason of facts of which he has not knowledge or means of knowledge, as *e.g.*, where his authority had determined through the death or lunacy of his principal (q). This implied contract may, however, be excluded by the facts of the particular case (r).

Lastly, if an agent fraudulently misrepresents his authority he may be sued *ex delicto* in an action for deceit (s).

2. **Agent acting with authority.**—Where an agent is acting with authority the general rule is that all rights and liabilities under any contracts or transactions made or entered into by him

(n) *Re Fenwick*, [1902] 1 Ch. 507; 71 L. J. Ch. 321.

(o) *Houghton & Co. v. Nothard, Lowe & Wills, Ltd.* (*ubi supra*).

(p) *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Simmons v. Liberal Opinion, Ltd.*, [1911] 1 K. B. 966; 80 L. J. K. B. 617.

(q) *Collen v. Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215; *Yonge v. Toynbee* [1910] 1 K. B. 215; 79 L. J. K. B. 203. See also *Starkey v. Bank of England*, [1903] A. C. 114; 72 L. J. Ch. 402; *Sheffield Corporation v. Barclay*, [1905] A. C. 114; 74 L. J. K. B. 747; *Edwards v. Porter*, [1925] A. C., at pp. 21–23; 94 L. J. K. B. 65. As to powers of attorney, see, however, s. 124 of the Law of Property Act, 1925.

(r) *Yonge v. Toynbee*, [1910] 1 K. B., at p. 227.

(s) *Polhill v. Walter*, 8 B. & Ad. 114; 1 L. J. K. B. 92.

will pass to his principal, whether disclosed or undisclosed (t). To this rule there are, however, the following general exceptions (u):—

(i) The rights (a) or liabilities (b) of the principal may be modified or excluded by the express terms of the contract.

(ii) If an agent enters into a contract by deed, to which his principal is not a party, he alone can sue or be sued upon it, even though he expressly describes himself as contracting on behalf of a named principal (c).

But by s. 123 of the *Law of Property Act*, 1925, the donee of a power of attorney may, if he thinks fit, execute any instrument in and with his own name and signature, and under his own seal, where sealing is required, by the authority of the donor of the power; and every instrument so executed shall be as effectual in law to all intents as if executed in the name and with the signature and under the seal of the donor of the power.

(iii) When an agent is the payee or indorsee of a bill of exchange, promissory note, or cheque, he alone can sue upon it, though he may indorse it to his principal so as to enable the latter to sue.

No one, moreover, can be sued upon a bill of exchange, promissory note, or cheque, unless his signature appears thereon (d). Accordingly the principal is liable only if his name is signed thereon by himself or by an authorised agent; and, conversely, it is the agent who is liable if his name is signed thereon, unless he adds words to his signature indicating that he signs for or on behalf of his principal (e).

(t) *Sims v. Bond*, 5 B. & Ad. 389; 39 R. R. 511; *Thomson v. Davenport*, 9 B. & C. 78; 7 L. J. K. B. 184; 32 R. R. 578; *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224. The right to sue and the liability to be sued are correlative—"a man cannot make a contract in such a way as to take the benefit, unless he also takes the responsibility": *Miller, Gibb & Co. v. Tyrer*, [1917] 2 K. B., at p. 150; 86 L. J. K. B. 1259.

(u) Special exceptions also apply to factors, brokers and auctioneers: see *post*, Section 7.

(a) *Montgomerie v. U. K. Mutual S.S. Association*, [1891] 1 Q. B. 370; 60 L. J. Q. B. 429.

(b) *U. K. Mutual S.S. Association v. Nevill*, 19 Q. B. D. 110; 56 L. J. Q. B. 222.

(c) *Appleton v. Binks*, 5 East 148; 7 R. R. 672; *Berkeley v. Hardy*, 5 B. & C. 355; 4 L. J. K. B. 184; see also *Torrington v. Lowe*, L. R. 4 C. P. 26; 38 L. J. C. P. 121.

(d) Bills of Exchange Act, 1882, s. 23.

(e) *Id.*, ss. 22, 26, 91. Moreover, save in the case of an acceptance for honour, no one can be liable as acceptor of a bill except the person to whom it is addressed (*id.*, s. 17). Accordingly, if a bill is drawn upon an agent, only the agent can be liable as acceptor, and, if it is drawn upon a principal, only the principal can be liable as acceptor.

But by s. 108 (4) of the *Companies Act*, 1948, if a director, manager, or officer of a company, or any person on its behalf, signs or authorises to be signed on its behalf, any bill of exchange, promissory note, cheque, or order for money or goods, wherein the name of the company is not mentioned in legible characters as therein provided, he is personally liable for the amount thereof, unless it is duly paid by the company.

(iv) Where, in cases other than the foregoing, an agent contracts personally, *either* he or his principal can sue and be sued. Whether or not an agent has contracted personally is a question depending upon the intention of the parties to the contract as ascertained by the terms of the contract or the circumstances of the case (f). If the contract is wholly in writing this is a question of law (g), otherwise it is a question of fact.

In order to enable the Court to ascertain the intention of the parties evidence is admissible of any custom in the particular trade or business which is not inconsistent with the express terms of the contract; such custom then qualifies the contract as if it were an express term thereof (h).

Where an agent contracts for a named principal he is presumed not to have contracted personally (i).

Where, however, an agent, though he is *acting* as agent for a named principal, and though he *describes* himself in a contract as agent, *signs* the contract in his own name, he is presumed to have contracted personally unless, either in the body of the contract or by some qualification of his signature, he indicates that he is contracting on behalf of that principal (k). Thus—

In *Parker v. Pinlow* (l), a charterparty was expressed to be made "between P., of the good ship C., and W., agent for E. W. & Son". It was signed by W. without any qualification of his signature. *Held*, that W. was personally liable as charterer.

In *Hutcheson v. Eaton* (m), the defendants signed a contract note in these terms: "We have this day sold you the

(f) *Green v. Kopke*, 18 C. B., at p. 560; 25 L. J. C. P. 297; *Cooke v. Wilson*, 1 C. B. (N.S.) 153; 26 L. J. C. P. 15; *Gadd v. Houghton*, 1 Ex. D. 357; 46 L. J. Q. B. 71; *Repetto v. Millar's, etc., Ltd.*, [1901] 2 K. B. 306; 70 L. J. K. B. 561; *Gardiner v. Heading*, [1928] 2 K. B., at p. 290; 97 L. J. K. B. 766.

(g) *Ante*, p. 92.

(h) *Fleet v. Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(i) *Ex p. Hartop*, 12 Ves., at p. 352; *Green v. Kopke* (*ubi supra*); *Fairlie v. Fenton*, L. R. 5 Ex. 169; 39 L. J. Ex. 107.

(k) *Gadd v. Houghton* (*ubi supra*); *Brandt & Co. v. Morris & Co.*, [1917] 2 K. B. 784; 87 L. J. K. B. 101; *Universal Steam Navigation Co. v. McKelvie*, [1923] A. C. 492; 92 L. J. K. B. 467.

(l) 7 E. & B. 942; 27 L. J. Q. B. 49.

(m) 13 Q. B. D. 861.

following goods, etc. (Signed) F. J. Eaton & Son, Brokers". *Held*, that they were personally liable, the word "brokers" being only a word of description.

In *Fairlie v. Fenton* (n), the plaintiff signed a contract note in the following form: "I have this day sold you on account of T., etc. (Signed) E. F., broker". *Held*, that he had not contracted personally.

In *Deslandes v. Gregory* (o), a charterparty was made between the plaintiff, who was a shipowner, and the defendants, who were agents for Samuel Ferguson, a merchant of Anamaboe in Africa. It was signed "for S. Ferguson, Esq., of Anamaboe, Gregory Brothers, as agents". *Held*, that "it would require extremely plain words in the body of the contract to control the effect of that mode of signature" and that, in spite of some slight ambiguity in the introductory part of the charterparty, the defendants had not contracted personally.

When a contract is in writing, and is in such terms as to indicate an intention on the part of the agent to contract personally, he cannot give oral evidence for the purpose of showing that it was the intention of the parties that he should not be personally liable, because such evidence would be inconsistent with the written agreement (p).

The same rules apply when an agent contracts for a principal whose existence he discloses but whose name he does not disclose.

But in this case, even though the contract is in writing, the agent may declare himself to be the real principal and may sue upon the contract (q) or may be proved to be the real principal and may be sued upon it (r) or may be liable upon it by virtue of a trade custom (s).

Where an agent contracts without disclosing the existence of a principal, he thereby contracts personally. But even though the contract is in writing, oral evidence may be given to show who is the real principal, so as to enable him to sue and be sued (a), unless the contract was one in which importance

(n) L. R. 5 Ex. 169; 39 L. J. Ex. 107.

(o) 2 E. & E. 610; 30 L. J. Q. B. 36.

(p) *Higgins v. Senior*, 8 M. & W. 834; 11 L. J. Ex. 199.

(q) *Schmalz v. Avery*, 16 Q. B. 355; 20 L. J. Q. B. 228; *Haiper & Co. v. Vigers Bros.*, [1903] 2 K. B. 549; 78 L. J. K. B. 876.

(r) *Carr v. Jackson*, 7 Ex. 382; 21 L. J. Ex. 137.

(s) *Fleet v. Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(a) *Higgins v. Senior* (*ubi supra*); *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224. In this case the evidence merely shows whom the agreement binds and is not inconsistent with it, as is the case when it is offered to show that an agent who has contracted personally was not intended to be personally liable.

attached to the personality of the agent (b), or credit was given exclusively to the agent (c), or evidence of the existence of the principal would contradict the express terms of the contract (d).

Thus, in *Humble v. Hunter*, where an agent executed a charterparty in which he was described as the "owner" of the ship, it was held that evidence was not admissible to show that he contracted as agent for the real owner (e).

*Contracts for foreign principals.*—It was at one time considered that, when an agent contracted for a foreign principal, there was a presumption that he contracted personally. It has, however, recently been stated that, if such a presumption ever existed (f), it has no application to modern conditions, and that in the absence of any general or special custom there is no presumption of law or fact that an agent contracting for a foreign principal contracts personally (g). And it has further been held that, assuming the modern existence of such a presumption, it cannot apply where it is inconsistent with the terms of a contract expressly stating that the foreign principal is to be liable or establishing privity of contract between the foreign and the English principal (h).

Where, however, in an oral contract the facts are doubtful, or where the terms of a contract are ambiguous, the facts that the principal is a foreigner and that his name is not disclosed are circumstances to be considered in determining what inferences of fact are to be drawn as to the intention of the parties (i).

(b) *Greer v. Downs Supply Co.*, [1927] 2 K. B., at p. 85; 96 L. J. K. B. 584; *Collins v. Associated Greyhound Racecourses, Ltd.*, [1980] 1 Ch. 1.

(c) *Calder v. Dobell (ubi supra)*.

(d) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A. C., at p. 864; 84 L. J. K. B. 1680.

(e) 12 Q. B. 310; 17 L. J. Q. B. 350; 76 B. R. 291; see also *Formby v. Formby*, 102 L. T. 106. But where an agent contracted as "charterer", evidence was admitted to show that he contracted as agent so as to permit the undisclosed principal to sue: *Drughorn, Ltd. v. Rederiaktiebolaget Transatlantic*, [1919] A. C. 203; 88 L. J. K. B. 283.

(f) As to which see *Green v. Kopke*, 18 C. B. 549.

(g) *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259; *Brandt v. Morris*, [1917] 2 K. B., at pp. 793, 797; 87 L. J. K. B. 101; *Universal Steam Navigation Co. v. McKelvie*, [1928] A. C., at p. 496; 92 L. J. K. B. 647.

(h) *Miller, Gibb & Co. v. Smith & Tyrer, Ltd. (ubi supra)*; *Mercer v. Wright*, 33 T. L. R. 295.

(i) *Mercer v. Wright (ubi supra)*; *Brandt v. Morris (ubi supra)*; *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K. B., at pp. 162, 163.

**Discharge of principal by election of third party to charge agent.**—Where *either* the agent or the principal is liable the other party to the contract cannot sue both, but must elect which he will hold liable; and if he finally elects to make either liable, he loses his remedies against the other (*k*). The following rules on this point are laid down in the cases of *Paterson v. Gandasequi* (*l*) and *Thomson v. Davenport* (*m*) and subsequent decisions:—

(1) If A knows that the person who is nominally dealing with him is not a principal, but an agent, *and also knows who the real principal is*, but chooses to make the agent his debtor, dealing with him and him alone, he cannot afterwards make the principal liable (*n*).

(2) If A supposes himself to be dealing with a principal, whereas in fact he is dealing with an agent, he may sue the principal upon discovering him, unless either (i) the principal has in good faith paid the agent while credit was still given exclusively to the agent (*o*), or (ii) A has, after discovery of the principal, unequivocally elected to make only the agent liable (*p*), of which election the recovery of judgment against the agent is conclusive proof (*q*).

(3) If A knows that he is dealing with an agent, but does not know the name of the principal, his position is the same as if the existence of the principal had been undisclosed, except that the principal is not discharged by payment to the agent, unless he was misled by some conduct of A into the belief that the agent had already settled with A and made such payment in consequence of such belief (*r*).

**Discharge of third party by settlement with agent.**—A person dealing with an agent who is permitted by his principal to contract as a principal is discharged from liability towards the

(*k*) *Repetto v. Millar's, Ltd.*, [1901] 2 K. B., at p. 310; 70 L. J. K. B. 561.

(*l*) 15 East 62.

(*m*) 9 B. & C., at p. 86; 7 L. J. K. B. 134.

(*n*) *Gardiner v. Heading*, [1928] 2 K. B. 284; 97 L. J. K. B. 766.

(*o*) *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 263, as explained in *Irvine v. Watson* (*infra*).

(*p*) *Caldar v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224.

(*q*) *Priestley v. Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172. If judgment is recovered against the agent the principal cannot afterwards be sued, even though the judgment does not result in satisfaction of the debt: *Kendall v. Hamilton*, 4 A. C., at p. 514; 48 L. J. C. P. 705; see also *Morel Bros. v. Westmorland (Earl)*, [1904] A. C. 11; 73 L. J. K. B. 93; *Moore v. Flanagan*, [1920] 1 K. B. 919; 89 L. J. K. B. 417.

(*r*) *Irvine v. Watson*, 5 Q. B. D. 414; 49 L. J. Q. B. 531; *Davison v. Donaldson*, 9 Q. B. D. 623.

real principal by payment to or settlement with the agent and may set up as against the real principal any defence or set-off which he could have set up against the agent, provided that such payment or settlement was made or such defence or set-off arose before the disclosure of the real principal (s).

Thus, in *Borries v. Imperial Ottoman Bank* (t), S., being entrusted by B. with the possession of goods for sale, sold them in his own name, the buyers believing him to be the owner. Subsequently, but before the buyers knew that S. was only an agent, he became indebted to them. In an action brought by B. for the price of the goods, it was held that the buyers might set off the amount due to them from S.

This principle rests upon the doctrine of estoppel: accordingly, in order to give a buyer of goods these rights, it is not sufficient to show merely that the agent sold in his own name, the buyer not knowing whether he was acting as agent or as principal; it must be shown that the agent was permitted by the real principal to hold himself out as the principal, and that the buyer, in dealing with the agent as principal, acted upon a belief induced by the conduct of the real principal (x). And, if the buyer acts in the honest belief that the agent is the real principal, he does not lose his right of set-off merely because he had notice of facts which have put him upon inquiry as to who was the real principal, for the doctrine of constructive notice cannot properly be applied in purely commercial transactions (y).

### SECTION 6.—*Determination of Agency*

The authority of an agent is irrevocable in the following cases—

- i. Where it is an “authority coupled with an interest”, i.e., where it was given by deed or for valuable consideration for the purpose of giving some benefit to the donee, as, e.g., where the principal gives the agent authority to sell

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(s) Bullen & Leake (3rd ed.), p. 688; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; 43 L. J. C. P. 3.

(t) *Ubi supra*.

(x) *Cook v. Eshelby*, 12 A. C. 271; 56 L. J. Q. B. 505, explaining *George v. Clagett*, 7 T. R. 359; 4 R. R. 462, and earlier authorities. The principle is not confined to the sale of goods and has been applied to a case in which the agent was employed to collect money, see *Montagu v. Forwood*, [1898] 2 Q. B. 350.

(y) *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28; 96 L. J. K. B. 534.



goods for the purpose of repaying a debt due to him from the principal (z).

- ii. Where liability has been incurred by the agent in pursuance of the authority given to him (a). But the authority is not rendered irrevocable because an interest subsequently arises, *e.g.*, where the agent has made advances to his principal *after* the authority has been given to him (b).
- iii. Where a power of attorney, created after December 31, 1882, and given for valuable consideration, is expressed to be irrevocable, or, whether given for valuable consideration or not, is expressed to be irrevocable for a fixed time therein stated and not exceeding one year from its date; in which cases it cannot be revoked as against a purchaser (c).

In other cases the contract of agency may be determined in the same way as any other contract and either by operation of law or by act of the parties. Thus the authority of an agent may be determined by operation of law :—

1. By the happening of any event on the occurrence of which it has been expressly or impliedly agreed that the agency shall cease, *e.g.*, by the completion of the transaction or expiration of the time for which it was given (d), or by the happening of any event which renders its continuance unlawful (e), or by the destruction of the subject-matter of the agency, as, *e.g.*, if the principal sells the business in which he is employing the agent (f).

(z) *Gausson v. Morton*, 10 B. & C. 731; 8 L. J. (o.s.) K. B. 313; 34 R. R. 558; *Smart v. Sandars*, 5 C. B., at p. 917; 75 R. R. 849; *Carmichael's Case*, [1896] 2 Ch. 643; 65 L. J. Ch. 902.

(a) *Read v. Anderson*, 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55. The principle of this case remains good though its application to the particular facts has been removed by the Gaming Act, 1892: *ante*, p. 180.

(b) *Smart v. Sandars*, 5 C. B., at p. 918.

(c) Ss. 126 and 127 of the Law of Property Act, 1925, re-enacting ss. 8 and 9 of the Conveyancing Act, 1882.

(d) *Seton v. Slade*, 7 Ves., at p. 276; 6 R. R. 124; *Blackburn v. Scholes*, 3 Camp. 343; *Bell v. Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397. Cp. *Keppel v. Wheeler*, *ante*, p. 457.

(e) *Marshall v. Glanville*, [1917] 2 K. B. 87; 86 L. J. K. B. 767.

(f) *Rhodes v. Forwood*, 1 A. C. 256; 47 L. J. Ex. 396; *French & Co v. Leeston Shipping Co*, [1922] 1 A. C. 451; 91 L. J. K. B. 655.

2. By the death (*g*), insanity (*h*), or bankruptcy (*i*) of the principal, or where the principal is a company or partnership by its winding-up or dissolution, unless, where a partnership is dissolved by the death or retirement of a partner, the contract was not of a personal character (*k*).

3. By act of the parties, either by agreement between them or by revocation by the principal or renunciation by the agent.

It must, however, be observed that, in cases where the contract of agency is brought to an end by a *breach* of the agreement between the principal and the agent, although the authority of the agent is thereby determined, the party guilty of the breach of contract may be liable in damages (*l*).

When an agent is employed otherwise than for a fixed period the contract may be determined by reasonable notice. Where, however, there is no contract to *employ* the agent, but merely a contract, for no definite time, to pay him commission on orders obtained by him, the principal may at any time revoke his authority without notice (*m*).

Where there is a contract to employ an agent for a fixed period, the question whether the principal is bound to carry on his business for that period, or whether he may terminate his business, and so terminate the contract of agency, depends, in each case, upon the terms of the contract. But the Court will not imply a term that the contract is to remain in force only so long as the principal carries on his business or remains in existence, unless this is a "necessary implication" from the express terms (*n*).

(*g*) *Farrow v. Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326.

(*h*) *Drew v. Nunn*, 4 Q. B. D. 661; 48 L. J. Q. B. 591; *Yonge v. Toynbee*, [1910] 1 K. B. 215; 79 L. J. K. B. 208.

(*i*) I.e., by the fact that a receiving order has been made or by notice of an available act of bankruptcy: see *Ex p. Snowball*, L. R. 7 Ch. 534; 41 L. J. Bk. 49; *Markwick v. Hardingham*, 15 Ch. D. 339; *Re Pollitt*, [1893] 1 Q. B. 455; 62 L. J. Q. B. 236.

(*k*) As to the winding up of a company, see *Stirling v. Matland*, 5 B. & S. 840; 34 L. J. Q. B. 1; *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 48; 69 L. J. Ch. 20; *Fowler v. Commercial Timber Co.*, [1930] 2 K. B. 1; 99 L. J. K. B. 529. As to the dissolution of a partnership, see *Phillips v. Alhambra Palace Co.*, [1901] 1 K. B. 59; 70 L. J. K. B. 26 (reviewing the authorities).

(*l*) *Simpson v. Lamb*, 17 C. B. 608; *Fowler v. Commercial Timber Co.* (*ubi supra*).

(*m*) *Levy v. Goldhill*, [1917] 2 Ch. 297; 86 L. J. Ch. 693.

(*n*) *Reigate v. Union Manufacturing Co.*, [1918] 1 K. B., at p. 605; 87 L. J. K. B. 724; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109; 74 L. J. K. B. 433; *Fowler v. Commercial Timber Co.*, [1930] 2 K. B. 1; 99 L. J. K. B. 529.

Where, on the other hand, there is no contract to *employ* an agent for a fixed period, but merely that he shall be sole agent for that period, the Court will not, unless such an implication necessarily arises, imply a term that the employer shall continue his business for that period (*o*).

As to revocation, it must be further noticed that when a person has been held out as agent no determination or revocation of his authority is operative as against persons to whom he has been so held out, unless it has been actually communicated to them (*p*).

### SECTION 7.—*Mercantile Agents*

The chief mercantile agents are factors, brokers, and auctioneers (*q*).

**Factors.**—A factor is a mercantile agent to whom goods are consigned for sale in the ordinary course of his business. He has possession of the goods, implied authority to sell in his own name, and (subject to express instructions) at such times and prices as in his discretion he may think best, implied authority to receive payment, and a *general* lien on the goods and their proceeds (*r*).

**Brokers.**—A broker is “a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them” (*s*). For this purpose he enters in his broker’s book a memorandum of the contract, and sends to the buyer a *bought note* and to the seller a *sold note*. He is not entrusted with the custody or possession of the goods, and therefore has no lien. He has no implied authority to buy or sell in his own name or to receive payment (*t*).

(*o*) *Rhodes v. Forwood*, 1 A. C. 256; 47 L. J. Ex. 896; *Hamlyn v. Wood*, 60 L. J. Q. B. 784; *Ogden v. Nelson*, [1904] 2 K. B. 895; see also *Lazarus v. Cairn S.S. Line, Ltd.*, 106 L. T. 378; *Re Newman, Ltd.*, [1916] 2 Ch. 309; 85 L. J. Ch. 625.

(*p*) *Summers v. Solomon*, 26 L. J. Q. B. 301; 7 E. & B. 879; *Drew v. Nunn*, 4 Q. B. D. 461; 48 L. J. Q. B. 391 (insanity of principal); *Debenham v. Mellon*, 6 A. C. 24; 50 L. J. Q. B. 135; *Willis, Faber & Co. v. Joyce*, 104 L. T. 578.

(*q*) For the special definition and powers of mercantile agents under the Factors Acts, see *post*, Part III, Chapter V.

(*r*) See *Baring v. Corrie*, 2 B. & Ald. 187; 20 R. R. 383; *Smart v. Sanders*, 5 C. B. 895; 17 L. J. C. P. 238; 75 R. R. 819; *Stevens v. Biller*, 23 Ch. D. 31; 53 L. J. Ch. 249. As to dispositions of goods by mercantile agents generally see *post*, Part III, Chapter V.

(*s*) *Mollett v. Robinson*, L. R. 9 C. P., at p. 97.

(*t*) *Fairlie v. Fenton*, L. R. 5 Ex., at p. 172; 39 L. J. Ex. 107. But in accordance with the rules already given (*ante*, p. 480), a broker *may* contract so as to render himself personally liable.

**Auctioneers.**—An auctioneer is an agent for the purposes of sale by public auction. He has possession of the goods and a lien for his charges, and if they are unpaid may sue in his own name for the price (u). He has no implied authority to warrant goods sold by him (x). He has no implied authority to give credit to the buyer or to receive payment otherwise than in cash (y).

He has implied authority to sell without reserve, and, if he does so, the vendor cannot set up as against the buyer a limitation of that authority not known to the buyer (z). He has implied authority to sign a memorandum of the contract of sale, not only for the vendor but also for the purchaser, but, in order to bind the purchaser, the memorandum must be made at the time of the sale and as part of the transaction (a), and by the auctioneer himself, his clerk having no implied authority to sign for the purchaser (b). But such a signature on behalf of the purchaser will not be sufficient in an action brought by the auctioneer himself against the purchaser (c).

**Del credere agents** are agents who, for an extra commission, termed a del credere commission, undertake to be liable for the price of goods sold by them in case of non-payment by the purchasers (d). But this liability arises only when there is an ascertained debt due from the buyer to the seller and the buyer refuses to pay either through insolvency or something which makes it as impossible to recover as in the case of insolvency : it does not extend to other obligations of the contract so as to make

(u) *Williams v. Millington*, 1 H. Bl. 81; 2 R. R. 724; *Robinson v. Rutler*, 4 E. & B. 954; 24 L. J. Q. B. 250; *Grice v. Kenrick*, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175. He also may contract personally with the purchaser : *Woolfe v. Horne*, 2 Q. B. D. 355; 46 L. J. Q. B. 534.

(x) *Payne v. Leconfield (Lord)*, 51 L. J. Q. B. 642.

(y) *Williams v. Evans*, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

(z) *Rainbow v. Howkins*, [1904] 2 K. B. 322; 73 L. J. K. B. 641.

(a) *Bell v. Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; *Chaney v. Macleod*, [1929] 1 Ch. 461; 98 L. J. Ch. 345. In the first of these cases the memorandum was not signed by the auctioneer until a week after the contract, which was held to be too late. In the second case it was held that it is, in each case, a question of fact whether the signature of the memorandum by the auctioneer is part of the transaction of sale, and (upon the facts of the particular case), that the implied authority of the auctioneer to bind the purchaser was still continuing although he signed the memorandum in his office, which was about three miles from the auction room, and about two hours after the sale, there being, as the Court found, reasonable ground for the delay.

(b) *Bell v. Balls* (*ubi supra*). But the purchaser may give the auctioneer's clerk express authority to sign as his agent (*ibid*).

(c) *Farebrother v. Simmons*, 3 R. & Ald. 383; 24 R. R. 399.

(d) *Hornby v. Lacy*, 6 M. & S., at p. 171; *Ex p. Bright, re Smith*, 10 Ch. D., at p. 570; 48 L. J. Ek. 81; *Weiss, etc., Ltd v. Farmer*, [1923] 1 K. B., at p. 240; 92 L. J. K. B. 179.

him liable for non-performance or expose him to an action by the seller to ascertain the amount due (e). The undertaking of a *del credere* agent is not a guarantee (f).

### SECTION 8.—*Married Women*

From the time of *Manby v. Scott* (g) it has been settled that a husband is not liable upon a contract of his wife unless it was made by her as his agent and with his authority. No liability arises from the fact of marriage only (h), and authority must exist in each case, although it may, on proof of certain circumstances, be *inferred* as a matter of fact, or *implied* by law or may arise from ratification of the contract (i).

1. Where a husband and wife are living together, and the wife, as manager of his household, buys "goods of such a character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls", a jury is justified in drawing the inference of fact that the wife had authority to act as the agent of her husband (k).

The inference is not rebutted by the fact that the wife has a separate income (l).

But it may be rebutted by proof—

- (a) That the goods were supplied on the credit of the wife to the exclusion of the credit of the husband (m) :
- (b) That the wife was already supplied with a sufficiency

(e) *Gabriel & Sons v. Churchill and Sim*, [1914] 3 K. B. 1272; 83 L. J. K. B. 491.

(f) *Post*, Part III, Chapter III, Section 1.

(g) (1659), 1 Sid. 112.

(h) *Debenham v. Mellon*, 6 A. C., at p. 31; 50 L. J. Q. B. 155.

(i) *Montague v. Benedict*, 3 B. & C., at pp. 635, 637; 3 L. J. K. B. 94; *Jolly v. Rees*, 15 C. B. (N.S.), at pp. 639—640; *Phillipson v. Hayter*, L. R. 6 C. P., at p. 41; 40 L. J. C. P. 14.

(k) *Paquin, Ltd. v. Beauclerk*, [1906] A. C., at p. 167; 75 L. J. K. B. 395. The same inference may be raised where the person to whom management is entrusted is a mistress or housekeeper: *Debenham v. Mellon*, 6 A. C., at p. 36. The actual decision in *Paquin, Ltd. v. Beauclerk* is no longer law; see Chitty on Contracts (20th ed.), p. 633.

(l) *Seymour v. Kingscote*, 38 T. L. R. 586; *Callot v. Nash*, 39 T. L. R. 291.

(m) *Paquin, Ltd. v. Beauclerk* (*ubi supra*).

of such goods or with a fixed or adequate allowance for the purchase of such goods (n) :

- (c) That the purchase of the goods was excessive in point of extent, or, having regard to the smallness of the husband's income or the standard of his expenditure, was extravagant (o).
- (d) That the wife had been forbidden by the husband to pledge his credit, even though this fact was unknown to the person supplying the goods (p). If, however, "an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife"—as, e.g., by his paying for goods supplied—the husband is liable to any person dealing with the wife on the faith of such "holding out", unless such person had actual notice that she had in fact no authority or that her authority had been revoked (q).

## 2. Where a husband and wife are living apart:—

- (a) If the husband has deserted the wife or has, by his conduct, compelled her to leave him, and has not in either case properly provided for her, the wife is, by *implication of law*, an *agent of necessity* for her husband, so as to bind him by her contracts for necessities (r), including necessities for infant children properly in her custody (s).

But even in this case a husband is not liable, even

(n) *Seaton v. Benedict*, 5 Bing. 28; *Debenham v. Mellon (ubi supra)*; *Morel Brothers v. Westmorland (Earl of)*, [1908] 1 K. B. 64; [1904] A. C. 11; 78 L. J. K. B. 98; *Slater v. Parker*, 24 T. L. R. 621; *Miss Gray, Ltd. v. Earl Cathcart*, 38 T. L. R. 562. It is for the husband alone to decide on the scale of domestic life: *Callot v. Nash (ubi supra)*.

(o) *Miss Gray, Ltd. v. Earl Cathcart (ubi supra)*.

(p) *Jolly v. Rees*, 15 C. B. (n.s.) 628; 43 L. J. C. P. 177; *Debenham v. Mellon (ubi supra)*.

(q) *Debenham v. Mellon*, 6 A. C., at pp. 38, 36; 50 L. J. Q. B. 155. See also *Jetley v. Hill*, 1 Cab. & E. 239. Here a husband and wife were living together, and furniture was supplied and work done for the house on the orders of the wife. The husband, however, took part in making selections of furniture and giving directions as to the work:—*Held*, that he was liable though he had forbidden her to pledge his credit, and it had been agreed between them that she should pay. A wife or mistress may, of course, be "held out" as having authority to act as agent in contracts other than for the supply of necessities.

(r) *Montague v. Benedict*, 3 B. & C., at p. 635; 3 L. J. K. B. 94; *Eastland v. Burchell*, 3 Q. B. D., at p. 436; 47 L. J. Q. B. 500; *Debenham v. Mellon*, 6 A. C., at p. 81.

(s) *Bazeley v. Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.

for necessities supplied to his wife, if she subsequently commits adultery (t).

By s. 194 of the Judicature Act, 1925, it is provided that where on any judicial separation alimony has been ordered to be paid and has not been duly paid by the husband, he shall be liable for necessities supplied for the use of the wife.

- (b) If the wife leaves the husband without his consent, no authority can be inferred or implied (w). But, if a wife or mistress has been held out to a particular person as having authority, he must have actual notice of its revocation (y).
- (c) If they separate by mutual consent, no authority is implied in law; but the authority of the wife to bind her husband by contracts for necessities may be inferred as a matter of fact—
  - i. If no adequate provision is made by him for her maintenance, and she has no separate means (z).
  - ii. If the husband does not pay an allowance which, upon separation, he has agreed to pay (a).

The term “necessaries” must be considered with regard to the husband’s “degree, estate, or circumstances”, and it is for the jury to decide as to the wife’s necessity (b), the burden of proof being upon the plaintiff (c).

It is in all cases the duty of a tradesman who sells goods to a married woman, if he wishes to make her husband liable, to

(t) *Govier v. Hancock*, 6 T. R. 608; *Atkyns v. Pearce*, 2 C. B. (N.S.) 763; 26 L. J. C. P. 232; 109 R. R. 876; *Wright & Webb v. Annandale*, [1930] 2 K. B. 8; 99 L. J. K. B. 444.

(x) *Johnston v. Sumner*, 3 H. & N., at p. 269; 27 L. J. Ex. 341; 117 R. R. 679; *Eastland v. Burchell*, 3 Q. B. D., at p. 435; 47 L. J. Q. B. 500.

(y) *Ryan v. Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271.

(z) *Johnston v. Sumner* (*ubi supra*); *Emmett v. Norton*, 8 C. & P. 506; 56 R. R. 848; *Dixon v. Hurrell*, 8 C. & P. 717. But not if she has separate means (*Clifford v. Laton*, 3 C. & P. 15) or an adequate allowance (*Reeve v. Conyngham*, 2 C. & K. 444). Whether the provision is adequate is a question for the jury: *Atkyns v. Pearce* (*ubi supra*); *Hodgkinson v. Fletcher*, 4 Camp. 70.

(a) *Hunt v. Dr Blaquiere*, 5 Bing., at p. 558; 7 L. J. C. P. 198; 30 R. R. 737; *Heale v. Arabin*, 36 L. T. 249. But not if he pays the agreed allowance, even though it is insufficient: *Eastland v. Burchell* (*ubi supra*).

(b) *Manby v. Scott* (*ubi supra*); and see *Hunt v. Dr Blaquiere* (*ubi supra*), and *Morgan v. Chetwynd*, 1 F. & F. 451.

(c) *Phillipson v. Hayter* (*ubi supra*).

inquire if she has his authority (d), and, if he knows that she is living apart from him, to inquire the cause of the separation (e).

A husband and wife *may* be *jointly* liable upon a contract, but the mere fact that the husband and wife, each having separate incomes, maintain a common establishment, for which goods are ordered by the wife, affords no evidence of such a joint liability, the fact that the order is by the wife being, if anything, evidence that she alone is liable (f).

If a husband and wife are jointly liable, a plaintiff who has recovered judgment against the husband cannot subsequently maintain an action against the wife (g). Where they are not jointly liable, the liability of the one is inconsistent with the liability of the other, so that if the plaintiff, having sued both husband and wife alternatively signs judgment against the wife, he cannot afterwards maintain any claim against the husband (h).

From the above it will be seen that an advertisement by a husband in a newspaper that he will not be responsible for his wife's debts is devoid of any effect. For, if they are living together, no notice is necessary unless he has held her out as his agent, in which case such an advertisement is insufficient; if, on the other hand, they are living apart, his liability depends, as a matter of law, upon the reason for the separation, and cannot be got rid of by any notice.

A husband was not at Common Law liable for money lent to his wife to buy necessities, even though he would have been liable upon a contract by her for necessities (i). But in such a case, if the money was actually spent in necessities, the lender was, in Equity, entitled to recover it from the husband, and the equitable rule now prevails (k).

#### SECTION 9.—Solicitors

The relationship of principal and agent between a solicitor and his client is created only by a retainer given by the latter (l).

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(d) *Montague v. Benedict*, 3 B. & C., at p. 637; 3 L. J. K. B. 94; *Paquin v. Beauclerk*, [1906] A. C., at p. 164; 75 L. J. K. B. 395.

(e) *Clifford v. Laton*, 3 C. & P., at p. 16.

(f) *Morel Brothers v. Westmorland*, [1908] 1 K. B., at p. 74; 78 L. J. K. B. 93.

(g) *See Hoare v. Niblett*, [1891] 1 Q. B. 781; 60 L. J. Q. B. 563.

(h) *Morel Brothers v. Westmorland*, [1908] 1 K. B., at pp. 76, 77; *Moore v. Flanagan*, [1920] 1 K. B. 919; 89 L. J. K. B. 417.

(i) *Knox v. Bushell*, 3 C. B. (N.S.) 884; 111 R. R. 676.

(k) *Deare v. Soutten*, L. R. 9 Eq. 151.

(l) *See Re Becket*, [1918] 2 Ch. 72; 87 L. J. Ch. 457.



i.e., an authority to act for him in some particular business. Unless writing is required by Common Law or under any statute (*m*) a retainer may be oral, and may also be inferred from the conduct of the parties (*n*). There is, however, "no such thing as a general retainer of a solicitor", so that special authority must be obtained from the client before litigious proceedings of any kind are taken by a solicitor (*o*).

The relationship between solicitor and client may be determined in the same way as any other contract of agency, as, e.g., by the death of either party (*p*) or by the withdrawal of the retainer by the client, or by the solicitor declining to act any further for the client. But where a solicitor is retained to prosecute or defend a cause, he enters into an entire contract to conduct the action to its termination; and if during the proceedings he refuses to act any further for the client, he cannot recover any costs for what he has done, unless there are circumstances justifying his refusal; as, for example, if the client repudiates his responsibility for costs, or refuses to make necessary advances for expenses (*q*).

Conversely, if there is a breach by the client of a contract to employ the solicitor for a particular business or period, the latter will have his remedy in the ordinary way for the breach of contract (*r*).

A solicitor is the general agent of his client in all matters which may reasonably be expected to arise for decision in an action (*s*), and has, therefore, implied authority to compromise an action, unless he is expressly forbidden to do so (*t*). But where he is merely employed to act for a client with regard to a claim by him against a third person, he cannot, in the absence of express authority, compromise the claim before action (*u*).

(*m*) As, e.g., where it is to last for more than one year: *Eley v. Positive Assurance Co.*, 1 Ex. D. 20; 45 L. J. Ex. 451.

(*n*) *Blyth v. Fladgate*, [1891] 1 Ch., at p. 355; 60 L. J. Ch. 66.

(*o*) *Re Gray, Gray v. Coles*, 65 L. T. 712; and see *Wray v. Kemp*, 26 Ch. D. 169; 53 L. J. Ch. 1020; *Lord v. Kellett*, 2 Myl. & K. 1; *Atkinson v. Abbott*, 3 Drew. 251; 106 R. R. 329.

(*p*) *Whitehead v. Lord*, 7 Ex. 691; 21 L. J. Ex. 299.

(*q*) *Underwood, Son and Piper v. Lewis*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60. See also *Hawkes v. Coltrell*, 3 H. & N. 243; 27 L. J. Ex. 369; *Wadsworth v. Marshall*, 2 C. & J. 665; 1 L. J. Ex. 250.

(*r*) *Re Galland*, 31 Ch. D., at p. 300; 55 L. J. Ch. 478; and see *Montforts v. Marsden*, [1895] 1 Ch. 11; 64 L. J. Ch. 52.

(*s*) *Prestwich v. Policy*, 18 C. B. (N.S.), at p. 816; 34 L. J. C. P. 189.

(*t*) *Prestwich v. Policy*, 18 C. B. (N.S.), at p. 816; and see *Re Newen, Carruthers v. Newen*, [1904] 1 Ch. 812; 72 L. J. Ch. 356; *Welsh v. Roe*, 87 L. J. K. B. 520.

(*u*) *Macaulay v. Policy*, [1897] 2 Q. B. 122; 66 L. J. Q. B. 665.

In the conduct of litigation the relationship between a country solicitor and a London agent is that of client and solicitor, and the London agent therefore has the same authority to make a compromise as the country solicitor, and may bind both the country solicitor and the lay client (x).

A solicitor is under an obligation to bring to the discharge of his duty reasonable care, skill and knowledge. Accordingly "he is liable for the consequences of ignorance or non-observance of the rules of practice . . . ; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually allotted to his department of the profession", but "he is not liable for error in judgment upon points of new occurrence, or of nice or doubtful construction" (y). He is also liable for the default or negligence of agents employed by him (z).

A solicitor is not debarred from buying from, selling to, or otherwise dealing with, his client, yet no transaction between him and his client while the relationship of solicitor and client exists can stand unless his client acted upon competent and independent advice, or he can prove that the transaction is fair and reasonable, that he made full and complete disclosure of all material facts, and gave to the client all reasonable advice against himself that he would have given to him against a third party (a).

The liability of a solicitor to third persons upon contracts made by him on behalf of his client is governed by the ordinary rules relating to agency, so that he is not personally liable upon liabilities incurred by him as agent for and with the authority of his client. Thus, he is not personally liable for the price of photographs which, as the photographer knows, are supplied to him as solicitor and for the purposes of litigation (b). Nor is he

(x) *Withers v. Parker*, 5 H. & N. 725; 29 L. J. Ex. 320; *Re Newen* (ubi supra); *Rhodes v. Fielder, Jones and Harrison*, 89 L. J. K. B. 15.

(y) *Godefroy v. Dalton*, 6 Bing. at p. 468; 8 L. J. C. P. 79. See also *Purves v. Landell*, 12 Cl. & Fin. 91; 69 R. R. 46; *Fletcher & Son v. Jubb, Booth and Helliwell*, [1920] 1 K. B. 275; 89 L. J. K. B. 236 (a solicitor is bound to know the provisions of s. 1 of the Public Authorities Protection Act, 1893).

(z) *Simmons v. Rose*, 31 Beav. 1; 135 R. R. 316; *Asquith v. Asquith*, [1895] W. N. 31.

(a) *Moody v. Cox and Hatt*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; see also ante, p. 460. In the case of a gift, unless it is of a trivial character, independent advice is always necessary: *Liles v. Terry*, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; *Willis v. Barron*, [1902] A. C. 271; 71 L. J. Ch. 609.

(b) *Wakefield v. Duckworth & Co.*, [1915] 1 K. B. 966; 84 L. J. K. B. 335.

liable for the expenses of witnesses whom he has caused to be subpoenaed (c), unless he specially pledges his own credit (d). But he is liable where he himself as principal employs a person to do anything for which he makes a charge, as, for example, a law stationer; so also he is liable for the fees of the officers of the Court (e).

A solicitor is not, however, liable only to his client, but he is also, as an officer of the Court, subject to its disciplinary jurisdiction, and, as such, may be liable to proceedings of a penal character if he fails in his duty to the Court or his client (f). And he may, as an officer of the Court, be liable to third persons other than his client, as, e.g., where by his negligence a fund in Court is improperly paid out to a third person (g). So also where he takes or continues proceedings without any authority from his client or after his authority has determined (h), or is guilty of professional misconduct in conducting proceedings (i), he is liable to pay the costs of the other party.

### Lien of Solicitor.

1. *Common Law lien*.—A solicitor has a lien for his taxable costs, charges, and expenses upon all the papers of his client which have come into his hands *as solicitor*, but not for ordinary advances nor upon papers coming to him in some other capacity, e.g., as mortgagee (k). But it is a *general lien*, not only for the costs of the particular business in the course of which the documents were used, but for other business also (l). And it is purely a *Common Law* lien: it depends, therefore, upon his actual possession of the papers and cannot be actively enforced. It creates no equitable charge, and is simply a right as against

(c) *Robins v. Bridge*, 3 M. & W., at p. 119; 7 L. J. Ex. 49.

(d) *Lee v. Everest*, 2 H. & N. 285; 26 L. J. Ex. 334; *Evans v. Philpotts*, 9 C. & P. 270; *Hallet v. Mcars*, 3 East 15.

(e) *Robins v. Bridge* (*ubi supra*); *Er p. Hartop*, 12 Ves., at p. 352; see also *Cooks v. Bruce, Searle and Good*; 21 T. L. R. 62 (solicitor liable to short-hand-writer).

(f) *Re Haynes*, 15 Ch. D., at p. 52; 49 L. J. Bk. 62.

(g) *Re Dangar's Trusts*, 41 Ch. D. 178; 58 L. J. Ch. 315.

(h) *Simmons v. Liberal Opinion, Ltd.*, [1911] 1 K. B. 966; 80 L. J. K. B. 617. See also *Geilinger v. Gibbs*, [1897] 1 Ch. 479; 66 L. J. Ch. 230; *Fricker v. Van Grutten*, [1896] 2 Ch. 619; 65 L. J. Ch. 323. A solicitor is also subject to various disciplinary enactments under Part I of the Solicitors Act, 1932, as amended by the Solicitors Acts, 1933, 1936, 1939 and 1941.

(i) *Myers v. Elman*, [1940] A. C. 282; 109 L. J. K. B. 105.

(k) *Sheffield v. Eden*, 10 Ch. D. 291; *Re Taylor, Stileman and Underwood*, [1891] 1 Ch. 590; 60 L. J. Ch. 525.

(l) *Re Taylor, Stileman and Underwood*, [1891] 1 Ch., at p. 599.

his client and persons claiming through the client, but not as against persons claiming by a right superior to that of the client, to retain the papers until the costs are satisfied (*m*).

2. *Equitable lien*.—A solicitor has an *equitable lien*, not depending upon possession (*n*), on any money (*o*) or costs which have become payable to his client as a result of litigation conducted by him. This is a particular lien, extending only to the costs of the particular litigation (*p*), but it may be actively enforced by the Court by a charging order (*q*).

It does not, however, amount to an equitable assignment of, or a charge upon, the proceeds of the judgment (*r*); it is only a right to ask for the intervention of the Court for his protection when there is a probability of the client depriving him of his costs (*s*).

8. *Statutory lien*.—By s. 69 of the *Solicitors Act*, 1932, “any Court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the *property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding*, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser without notice, be void as against the solicitor; provided that no order shall be made if

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(*m*) See, as to the nature and extent of the lien, *Re Llewellyn*, [1891] 3 Ch. 145; 60 L. J. Ch. 732; *Re Hawkes*, [1898] 2 Ch. 1; 67 L. J. Ch. 284. Where there is a change of solicitors during an action in which persons other than the plaintiff and the defendant may be interested, as, *e.g.*, actions for the administration of the estate of a deceased person, or for the administration of the trusts of a deed, or for dissolution of partnership, the first solicitor cannot assert his lien over papers that have come into his hands in the course of the action so as to embarrass the other persons interested in the proceedings, but must, without prejudice to his lien, produce them when they are required for the carrying on of the proceedings: *Re Boughton*, *Boughton v. Boughton*, 23 Ch. D. 169; *Boden v. Hensby*, [1892] 1 Ch. 101; 61 L. J. Ch. 174; *Dessau v. Peters, Rushton & Co.*, [1922] 1 Ch. 1; 91 L. J. Ch. 254.

(*n*) *Mercer v. Graves*, L. R. 7 Q. B., at p. 508; 41 L. J. Q. B. 212.

(*o*) Not realty: *Shaw v. Neale*, 6 H. L. C. 581; 27 L. J. Ch. 444.

(*p*) *Hall v. Laver*, 1 Hare 571; 58 R. R. 198.

(*q*) *Hamer v. Giles*, 11 Ch. D. 942; 48 L. J. Ch. 508.

(*r*) *Mercer v. Graves* (*ubi supra*); see also *Ex p. Morrison*, L. R. 4 Q. B., at p. 156; 38 L. J. Q. B. 65.

(*s*) *Mercer v. Graves* (*ubi supra*).

the right to recover the costs is barred by any statute of limitation (t).

*Lien of London agent.*—Where a London agent is employed by a country solicitor he has all the foregoing liens : (i) as against the country solicitor for all costs for agency business and disbursements due from him, whether in the particular action or in any other proceedings ; but (ii) as against the client only for the costs of the particular action (u). If, however, the client settles with the country solicitor (by payment, set-off, or otherwise) without notice of the London agent's rights, such rights are lost (a).

### SECTION 10.—Partners

By s. 56 of the *Supreme Court of Judicature Act, 1925*, all causes and matters for the dissolution of partnership or for the taking of partnership accounts are assigned to the Chancery Division.

For almost every other purpose, however, the law relating to partners is merely a branch, but an important branch, of the law of agency.

The principal Act is the *Partnership Act, 1890* (y), but the *Limited Partnerships Act, 1907*, created a special type of partnership which will be explained later (z).

**Definition of Partnership.**—"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit" (a).

But the relation between members of any company or association which is—

- (a) Registered as a company under the *Companies Act, 1862*, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies (b); or

(t) This section replaces similar provisions in s. 69 of the *Solicitors Act, 1860*, which was held to apply only to property recovered in a Court of Justice and in civil proceedings, not where it was recovered by negotiation without litigation (*Mcguerditchian v. Lightbound*, [1917] 2 K. B. 298; 86 L. J. K. B. 889), or as an indirect result of criminal proceedings (*Re Humphreys*, [1908] 1 Q. B. 520; 87 L. J. Q. B. 412).

(u) *Lawrence v. Fletcher*, 12 Ch. D. 858; and see *Re Jones*, [1905] 2 Ch. 219; 74 L. J. Ch. 458.

(x) *Cockayne v. Harrison*, L. R. 15 Eq. 298; 42 L. J. Ch. 660.

(y) References in the text and notes are to this Act, unless otherwise stated.

(z) *Post*, p. 502.

(a) S. 1 (1). Note that the section says "a business", not "business".

(b) The law relating to joint stock companies was consolidated by the *Companies Act, 1948*.

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

[(c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries (c)]:

is not a partnership within the meaning of this Act (d).

"In determining whether a partnership does or does not exist, regard shall be had to the following rules (e):—

"(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not *of itself* create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

"(2) The sharing of *gross returns* does not *of itself* create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

"(3) The receipt by a person of a share of the *profits* of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

"(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not *of itself* make him a partner in the business or liable as such;

"(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not *of itself* make the servant or agent a partner in the business or liable as such;

"(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, *by reason only of such receipt*, a partner in the business or liable as such;

"(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not *of itself* make the lender a

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(c) This Court was abolished by the Stannaries Court (Abolition) Act, 1896.

(d) S. 1. (2).

(e) S. 2.

partner with the person or persons carrying on the business or liable as such. *Provided that the contract is in writing and signed by or on behalf of all the parties thereto;*

- “(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not, *by reason only of such receipt*, a partner in the business or liable as such.”

With regard, however, to paragraphs (d) and (e), it is provided that in the event of any such borrower of money, or purchaser of a goodwill, becoming bankrupt, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying insolvent, the lender of such money, or the vendor of such goodwill, shall not be entitled to recover anything in respect of his loan, or of the share of profits contracted for, until the claims of the other creditors for valuable consideration in money, or money's worth, have been satisfied (f). And it has been held that this provision applies to the case of a contract for the loan of money at interest varying with the profits, notwithstanding that the contract is not in writing (g).

The effect of the definition and rules is that, to constitute partnership—

- (i) there must be an association formed for the purpose of making profit. Thus an ordinary club is not a partnership (h);
- (ii) the object of the association must be the carrying on of a series of acts constituting a business. Thus an association formed for the purpose of enabling funds contributed by its members to be held and invested by trustees does not constitute a partnership merely because the trustees have the power to sell the securities held by them and re-invest the proceeds: but it would be otherwise if the association was formed for the business of speculating in shares (i).

By s. 45 of the Act the term “business” includes “every trade, occupation or profession”;

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(f) S. 8.

(g) *Re Fort, ex p. Schofield*, [1897] 2 Q. B. 495; 66 L. J. Q. B. 824.

(h) See *Wise v. Perpetual Trustee, Co.*, [1903] A. C. 149; 72 L. J. P. C. 81.

(i) *Smith v. Anderson*, 15 Ch. D., at p. 277; 50 L. J. Ch. 89.

- (iii) the business must be carried on in common, *i.e.*, so as to create the relationship of principal and agent, each partner being both principal and agent (*j*);
- (iv) neither co-ownership nor the sharing of gross returns of itself constitutes partnership. So, if two persons are joint owners of land and share the net profits made by letting it, they do not thereby become partners (*k*). So, also, where A, the proprietor of a theatre, let it for dramatic entertainments to B who supplied the company it was held that there was no partnership merely because A took half the gross proceeds as rent (*l*). But there may be a co-ownership of property *and* a partnership in the business of managing it, as *e.g.*, where co-owners of a mine work it in partnership as a colliery business (*m*);
- (v) sharing the net profits of a business is evidence from which the existence of partnership may be inferred as a fact (*n*); but this evidence may be negated by other facts, and the Court must in each case determine what was the real intent of the parties and the nature of the transaction as a whole (*o*).

**Formation of partnership. Number of partners.**—Subject to s. 4 of the *Statute of Frauds* (*p*), a partnership may be created in any manner. By ss. 429 and 484 of the *Companies Act*, 1948, if the number of partners exceeds ten in the case of a banking business, or twenty in the case of any other business, it must be registered under that Act, unless it is formed in pursuance of some other Act, or of letters patent, or is engaged in working mines within and subject to the jurisdiction of the Stannaries.

Persons who have entered into partnership are for the purposes of the Act called collectively a *firm*, and the name under

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(j) See *Cox v. Hickman*, 8 H. L. C. 268; 80 L. J. C. P. 125; 125 R. R. 148; *Walker v. Hirsch*, 27 Ch. D. 460; 54 L. J. Ch. 815.

(k) See *French v. Styring*, 2 C. B. (N.S.) at p. 866; 26 L. J. C. P. 181.

(l) *Lyon v. Knowles*, 3 B. & S. 556; 82 L. J. Q. B. 71.

(m) *Crawshay v. Maule*, 1 Swanst., at p. 523; 18 R. R., at p. 126; see also *Davis v. Davis*, [1894] 1 Ch., at p. 401; 68 L. J. Ch. 219.

(n) *Mollwo March & Co. v. Court of Wards*, L. R. 4 P. C. 419.

(o) *Davis v. Davis*, [1894] 1 Ch. 898; 68 L. J. Ch. 219; *Adam v. Newbigging*, 18 A. C., at p. 815; 57 L. J. Ch. 1066; 59 L. T. 267. "The Court looks at the transaction and says, 'Is this, in point of law, really a partnership?'"'; *Weiner v. Harris*, [1910] 1 K. B., at p. 290; 79 L. J. K. B. 842.

(p) *Ante*, p. 53.



which their business is carried on is called the firm name (*q*). But though the firm name may be used for certain purposes, a firm does not, like a company (*r*), become a new legal person distinct from the persons who compose it: it remains an aggregate of individuals, each of whom, except in the case of a limited partnership, is liable for all the debts of the firm.

There is nothing to prevent an infant from becoming a partner, and until he disaffirms the contract of partnership he is a member of the firm and entitled to all the benefits resulting from the partnership (*s*). But he cannot contract debts by trading, and therefore does not become liable for the debts of the firm. The adult partners are, however, entitled to insist that the partnership assets shall be applied in payment of the debts of the firm, and that until this is done no part of them shall be received by the infant (*t*). If one member of a firm is an infant, judgment cannot be recovered against the firm simply, but must be against the firm other than the infant (*t*).

**The Limited Partnerships Act, 1907.**—A limited partnership formed under this Act differs in many respects from an ordinary or general partnership. It must consist of one or more persons, called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons, to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property *valued at a stated amount*, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed. A limited partner shall not, during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and, if he does so,

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(*q*) S. 4. By s. 1 of the Registration of Business Names Act, 1916 (6 & 7 Geo. 5. c. 58), every *firm* having a place of business in the United Kingdom and carrying on business under a business name which does not consist of the true names of all the partners, and also every *individual* who carries on business under a business name which does not consist of his true surname, and every *individual* or *firm* who, or a member of which, has changed his name, except, in the case of a woman, in consequence of marriage, must furnish to the registrar the particulars required by s. 3. Any contract made by a person in default and relating to the business in respect of which he is in default is unenforceable by action, though, by s. 8, the Court may, in certain circumstances, grant relief, which has the effect of validating the contract *ab initio*: *Re Shaer*, [1927] 1 Ch. 355; 96 L. J. Ch. 282.

(*r*) See *Salomon v. Salomon & Co.*, [1897] A. C. 22; 66 L. J. Ch. 85.

(*s*) *Goode v. Harrison*, 5 B. & Ald. 147; 24 R. R. 807.

(*t*) *Lovell and Christmas v. Beauchamp*, [1894] A. C. 607; 63 L. J. Q. B.

shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back (u).

Every limited partnership must be registered as such in accordance with the provisions of the Act, or in default it will be deemed to be a general partnership, and every limited partner will be deemed to be a general partner (w).

**Liabilities of partners to outsiders.**—"Every partner is an agent of the firm and his other partners *for the purpose of the business of the partnership*; and the acts of every partner who does any act for carrying on, *in the usual way*, business of the kind carried on by the firm of which he is a member, bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, *and* the person with whom he is dealing *either* knows that he has no authority *or* does not know or believe him to be a partner" [s. 5].

"An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any rule of law relating to the execution of deeds or negotiable instruments" [s. 6] (x).

"Where one partner pledges the credit of the firm for a purpose *apparently* not connected with the firm's ordinary course of business, the firm is not bound unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner" [s. 7].

(u) Limited Partnerships Act, 1907, s. 4.

(w) *Id.*, s. 5. On registration a statement must be sent by post or delivered to the registrar of joint stock companies at the register office in that part of the United Kingdom in which the principal place of business is situated or proposed to be situated, containing the following particulars:—(a) the firm name, (b) the general nature of the business, (c) the principal place of business, (d) the full name of each partner, (e) the term, if any, for which the partnership is entered into and the date of its commencement, (f) a statement that the partnership is limited, and the description of every limited partner as such, (g) the sum contributed by every limited partner as such, and whether paid in cash or how otherwise: *Ib.*, s. 8. Any changes in a limited partnership must also be registered: *Ib.*, s. 9. Notice of any arrangement or transaction under which a general partner will become a limited partner or the share of a limited partner will be assigned to any person: *Ib.*, s. 10.

(x) See *ante*, p. 480. But a deed executed by one partner on behalf of the firm, though invalid as a deed, may be good as an equitable assignment: *Marchant v. Morton*, [1901] 2 K. B. 829; 70 L. J. K. B. 820.

"If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no action done in contravention of the agreement is binding on the firm with respect to persons *having notice of the agreement*" [s. 8].

"Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. Provided that where, after a partner's death, the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators, estate, or effects liable for any partnership debts contracted after his death" [s. 14].

*A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm, provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.*

*If a limited partner takes part in the management of the partnership business, he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner (y).*

From the above sections it will be seen that, following the ordinary rules applicable to agency, but subject to exceptions in the case of limited partners, every partner is liable for all acts of his partners which are done by them as his agents, and within their ostensible authority.

Every partner, whether an active or dormant partner, is liable for all the acts of his partners that are within the authority which, from the nature of the particular business, they may be presumed to possess and no private arrangements can limit that authority (z). But the firm is not liable if the person dealing with a partner knows that he has no authority or, not knowing that he is a partner, contracts with him personally.

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(y) Limited Partnerships Act, 1907, s. 6 (1).

(z) *Cox v. Hickman*, 8 H. L. C., at pp. 304, 305; 30 L. J. C. P. 125.

And the implied authority is limited to acts that are "apparently" within the ordinary course of business, so that if a partner does an act which apparently is for his private purposes, the other partners are not liable unless he has actual authority or they are estopped from denying his authority or have ratified his act.

Thus, a negotiable instrument given or indorsed in the firm's name, by one partner in a trading concern, for a transaction of the firm, will ordinarily bind the firm, though it will not be so in the case of a non-trading firm, *e.g.*, a firm of solicitors unless the partner had actual authority, as the giving or indorsing of negotiable instruments is not within the ordinary course of such a business (a).

One partner has no implied authority to bind his firm by a submission to arbitration (b), nor by borrowing money, unless, in the case of a trading firm, the money is properly borrowed for the purposes of the business (c), nor by giving a guarantee unless it is necessary for and within the apparent scope of the partnership business (d), which is not so in the case of a firm of solicitors (e).

### Nature of Partner's Liability.

A. *Debts and obligations.*—"Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts" [s. 9].

A *limited partner* is *prima facie* liable only to the extent of his contribution (f).

Partners are *joint debtors*; accordingly a partner has a right to demand that his other partners shall be made co-defendants with him. If this has not been done and a judgment is obtained against one partner, it is a bar to any further proceedings against

(a) *Hedley v. Bambridge*, 3 Q. B. 316; 11 L. J. Q. B. 293; *Garland v. Jacomb*, L. R. 3 Ex. 216. As to the power of a member of a firm of solicitors to bind his partners, see also *Harman v. Johnson*, 2 E. & B. 61; 22 L. J. Q. B. 297; (receipt of money for investment); *Plumer v. Gregory*, 18 Eq. 621; 43 L. J. Ch. 616 (borrowing of money).

(b) *Stead v. Salt*, 3 Bing. 101; 8 L. J. C. P. 175.

(c) *Plumer v. Gregory* (*ubi supra*).

(d) *Brettel v. Williams*, 4 Ex. 623; 19 L. J. Ex. 121.

(e) *Hasleham v. Young*, 5 Q. B. 833; 13 L. J. Q. B. 205.

(f) *Ante*, p. 502.

another surviving partner arising out of the *same cause of action*, because, since the debt was joint, there was only *one* cause of action, which had become merged in the judgment (g).

Thus, in *Kendall v. Hamilton*, A and B carried on business as partners, and borrowed money from C, who sued them and recovered judgment, but the judgment was unsatisfied owing to the insolvency of A and B. C *subsequently* discovered that D at the time of the loan was an undisclosed partner of A and B, and sued him for the debt. *Held*, that the judgment against A and B was a bar to any action against D (h).

On the other hand, in *Wegg Prosser v. Evans* (i), it was held that a judgment against one joint contractor on a cheque given by him alone for the joint debt was not a bar to an action against the other joint contractor *on the original contract*, the causes of action not being the same.

*Liability of incoming and outgoing partners.*—"A person who is admitted as a partner into an existing firm does not *thereby* become liable to the creditors of the firm for anything done before he became a partner. A partner who retires from a firm does not *thereby* cease to be liable for partnership debts or obligations incurred before his retirement. A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted" [s. 17].

Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has notice of the change. But an advertisement in the *Gazette* is sufficient notice as to persons who had *not* dealings with the firm before the date of the dissolution or change so advertised. The estate of a partner who dies, or who becomes bankrupt, or of a partner who, *not* having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively [s. 36].

Thus, if A, B and C are partners and D enters in place of C the liability of A, B and C towards *existing creditors* can be affected only by a novation (*ante*, p. 204) creating a new

(g) *Re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; *Kendall v. Hamilton*, 4 A. C. 504; 48 L. J. C. P. 705.

(h) *Ubi supra*. See also *McLeod v. Power*, [1898] 2 Ch. 295; 67 L. J. Ch. 551.

(i) [1895] 1 Q. B. 108; 64 L. J. Q. B. 1.

agreement between such creditors and the new firm. Towards *new creditors* the new firm is ordinarily alone liable, but a partner who has retired may remain liable if he has not given notice of his retirement and he must give individual notice to old customers (k).

A dormant partner, however, "may retire from a firm without giving notice to the world" (l).

**B. Delicts and misapplication of money or property.**—  
 "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act" [s. 10].

"Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss" [s. 11].

"Every partner is liable jointly with his co-partners and also severally for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding sections" [s. 12].

**Duties and liabilities of partners to each other.**—The following rules are laid down by the Act (m), *subject to any express or implied agreement to the contrary* :—

All partners are entitled to share equally in the capital and profits, and must contribute equally towards the losses.

The firm must indemnify every partner in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the firm's business or in anything necessarily done for the preservation of the business or property of the firm.

A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of 5 per cent. per annum from the date of the payment or advance.

(k) *Re Hodgson*, 81 Ch. D., at p. 184; 55 L. J. Ch. 241.

(l) *Heath v. Sanson*, 4 B. & Ad. 172; 2 L. J. K. B. 25. See also *Carter v. Whalley*, 1 B. & Ad. 11; 8 L. J. (o.s.) K. B. 340.

(m) S. 24 (as modified by the Limited Partnerships Act, 1907).

A partner<sup>2</sup> is not entitled before the ascertainment of profits to interest on the *capital* subscribed by him.

No partner is entitled to remuneration for acting in the partnership business.

The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Every partner (*other than a limited partner* (n)) may take part in the management of the business. Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners (or in a limited partnership by the majority of the *general partners*) (o), but no change may be made in the nature of the business without the consent of all the partners.

Partners are bound to render to each other true accounts and full information of everything affecting the partnership (p).

"Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection" (q).

"If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business" (r).

**Introduction of new partners. Assignment of share in partnership.**—No person may be introduced into a *general* partnership without the consent of all existing partners, but in the case of a *limited* partnership a person may be introduced as a partner without the consent of the existing limited partners (s).

An assignment by a *general* partner of his share does not make the assignee a partner, but only entitles him to receive the share of profits to which the assignor would otherwise be

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(n) See *ante*, p. 504.

(o) Limited Partnerships Act, 1907, s. 6 (5) (a).

(p) S. 28.

(q) S. 29.

(r) S. 30 As to this and the last section, see *Aas v. Benham*, [1891] 2 Ch. 244.

(s) S. 24 (7). Limited Partnerships Act, 1907, s. 6 (5) (d).

entitled (t) : but a *limited* partner may, with the consent of the general partners, assign his share so as to make his assignee a *limited* partner (u).

**Dissolution of partnership.**—*Subject to any agreement between the partners, a partnership is dissolved :—*

- i. If entered into for a fixed term or a single undertaking, by the expiration of the term or termination of the undertaking (w).
- ii. If entered into for an undefined time, by notice given by any *general* partner, but not by notice given by a *limited* partner (y). Where the partnership is not for a fixed term, any partner may at any time retire on giving notice (z).
- iii. By the death or bankruptcy of any *general*, but not *limited*, partner or (at the option of the other partners) by any *general*, but not *limited*, partner allowing his share to be charged under the Act for his separate debt (a). An executor of a deceased person *may* become a partner under a provision to that effect in the partnership articles, but he cannot by any such provision be compelled to do so (b). For if he becomes a member of the firm, he is personally liable to the same extent as any other member, although he is simply acting as trustee (c).

“A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership” (d).

A partnership may be dissolved by the Court (e) : (i) on the lunacy of a *general* partner, but not on the lunacy of a

(t) S. 31.

(u) Limited Partnerships Act, 1907, s. 6 (5) (b).

(x) S. 32.

(y) *Id.*, and s. 6 (5) (e) of the 1907 Act.

(z) S. 26.

(a) S. 33, and s. 6 (2) of the Act of 1907. By s. 23 it is provided that a writ of execution may not issue against partnership property except on a judgment against the firm, but that the Court may, on the application of a judgment creditor of a partner, make an order charging his interest with the debt and costs, and may appoint a receiver of his share.

(b) *Lancaster v. Allsup*, 57 L. T. 53.

(c) *Wightman v. Townroe*, 1 M. & S. 412; 14 R. R. 475. He is, however, entitled to indemnity out of his testator's estate if he has acted properly: *Lumsden v. Buchanan*, 4 Macq. H. L. 950; 149 R. R. 392.

(d) S. 34.

(e) S. 35.



limited partner, unless his share cannot otherwise be realised; (ii) if a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the contract, or is guilty of conduct calculated to prejudice the carrying on of the business or wilfully commits a breach of the partnership agreement, or otherwise so conducts himself in relation to the business that it is not practicable to carry it on with him; (iii) if the business can only be carried on at a loss; (iv) if any circumstances render a dissolution just and equitable.

After dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far as may be necessary to wind up the partnership affairs and to complete transactions begun, but unfinished, at the date of the dissolution, but not otherwise (f). Thus, if one partner dies the survivor may continue the business for the purpose of winding it up, and may sell or mortgage the partnership property for the purpose of paying its liabilities (g).

A firm is in no case bound by the act of a partner who has become bankrupt, but this does not affect the liability of any person who has after the bankruptcy represented himself, or knowingly suffered himself to be represented, as a partner of the bankrupt (h).

On dissolution of a partnership, every partner is entitled to have its property applied in payment of its debts and liabilities and to have the surplus assets applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may apply to the Court to wind up the business (i). The goodwill of the business is part of the assets, and in the absence of any contrary provision in the partnership agreement it must be sold with the remaining assets (k); if it is not sold, each partner may, in the absence of any contrary agreement, carry on business under the firm name, provided that he does not do it in such a manner as to expose the others to any liability (l).

(f) S. 38.

(g) *Re Bourne*, [1906] 2 Ch. 427; 75 L. J. Ch. 779.

(h) S. 38.

(i) S. 39.

(k) *Thynne v. Shove*, 45 Ch. D., at p. 577; 59 L. J. Ch. 509; *Burchell v. Wilde* [1900] 1 Ch., at p. 558; 69 L. J. Ch. 314.

(l) *Burchell v. Wilde* (*ubi supra*).

Subject to any contrary agreement, the following rules are observed in settling accounts after a dissolution :—

1. Losses are paid first out of profits, next out of capital, and lastly by the partners individually in the proportion in which they were entitled to share profits.

2. The assets must be applied (i) in paying the debts of the firm to outsiders ; (ii) in repayment of advances made by any partner to the firm ; (iii) in repayment of the capital contributed by each partner. The residue is divided among the partners in the proportion in which profits are divisible (*m*).

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(*m*) S. 44.

## CHAPTER II

## MASTER AND SERVANT

SECTION 1.—*The Contract between Master and Servant*SUB-SECTION 1.—*Creation, Duration and Termination  
of the Contract*

[This subsection must be read subject to certain statutes and statutory orders at present in force which modify this Common Law statement of the position relating to the creation, duration and termination of contracts between master and servant. For instance :—

- (a) by the *Reinstatement in Civil Employment Act, 1944*, and the *National Service Act, 1948*, a former employer is obliged to reinstate, for a certain period, an *ex-service-man* who makes application to be taken back into his former employment:
- (b) by the *Registration of Employment Order, 1947*, the Minister of Labour and National Service is enabled by public notice, to require men and women between certain ages, with certain exceptions, and employers, to register particulars of themselves. The Minister has power also to direct persons into undermanned industries.

Since the duration of these statutes and orders is uncertain and since some, indeed, may become permanent, the student is advised to have them in mind even for examination purposes.]

**Creation of the Contract.**—The relationship of master and servant is created by a contract of service which binds the master to take the servant into his service and binds the servant to obey the orders of the master in respect of the service which is the subject of the contract.

There are many kinds of contracts of service and no complete definition of this expression has yet been framed (a). The term “servant” has, moreover, special meanings for the purposes of various statutes.

The broad differences between a servant and an independent contractor and between a servant and an agent have already

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(a) See *Simmons v Heath Laundry Co.*, [1910] 1 K. B. 548, at p. 549: 79 L. J. K. B. 395.

been explained (b). But there is also a difference between a contract of *service* and a contract *for services*. Thus, while a contract between a football club and a professional football player is a contract of service (c), a contract to take lessons from a "skilled music master" is a contract for services (d). No rule of law can be laid down distinguishing the one class of contracts from the other: it is a question of fact to be decided by all the circumstances of the case, and in particular by the amount of control exercised by the employer over the person rendering the services (e).

The main classes of servants are (i) seamen; (ii) apprentices; (iii) menial and domestic servants; (iv) workmen and persons employed in non-domestic occupations.

Contracts for service at sea are governed by statutory regulations which are outside the scope of this book.

Contracts of apprenticeship must be in writing (f).

All other contracts of service, unless subject to special statutory provisions, are governed both with regard to the capacity of the parties thereto and the method of their formation, by the ordinary rules relating to contracts. Accordingly, unless they must be by deed (g), or written evidence is required under the Statute of Frauds because the contract is not to be performed within a year (h), they may be made in any form and may be either express or inferred from circumstances.

Like other contracts they must, unless made by deed, be supported by valuable consideration. If no rate of remuneration is fixed the servant can recover a reasonable amount provided that an agreement to pay some remuneration can be inferred. Thus, when it is clear that remuneration was to be paid the servant can recover upon a *quantum meruit* if the amount of the remuneration is left to the master (i). But where it is left to the employer to determine whether any remuneration is payable, there is no sufficient certainty to constitute a contract (k) and no remuneration is therefore recoverable by the person employed (l).

(b) *Ante*, pp. 300 and 451.

(c) *Walker v. Crystal Palace Football Club, Ltd.*, [1910] 1 K. B. 87; 79 L. J. K. B. 229.

(d) *Simmons v. Heath Laundry Co.* (*ubi supra*).

(e) *Id* [1910] 1 K. B., at pp. 549, 550. See also *Gould v. Essex County Council*, [1942] 2 K. B. 293, *ante*, Part II, p. 301.

(f) *Kirkby v. Taylor*, [1910] 1 K. B. 529; 79 L. J. K. B. 267.

(g) *Ante*, p. 452.

(h) *Ibid*

(i) *Bryant v. Flight*, 5 M. & W. 114.

(k) *Ante*, p. 22.

(l) *Taylor v. Brewer*, 1 M. & S. 290.

**Duration of the Contract.**—Where no time for the duration of the contract is fixed it is called a “general hiring” and the ordinary inference is that it is for a year (*m*). But there is no inflexible rule of law to that effect and the question is one to be decided by the jury upon all the circumstances of the case (*n*).

The inference that the hiring is for a year is not rebutted by a provision for the *payment* of wages at periods less than a year, *e.g.*, weekly or monthly, because such periodical payments may be necessary to a person in the position of a servant (*o*). But it is as a rule rebutted when nothing is said as to the duration of the term or the amount of notice by which it is determinable, and the hiring is *at the rate of* so much per week or per month, those words being then construed to comprehend the period of service as well as the mode of payment (*p*).

Where there is a contract of hiring for a year, the continuation of the service at the expiration of the year, without any further express agreement, is evidence of a new contract for a second year on the same terms and determinable at the end of that year without notice (*q*). But, in commercial contracts, the modern tendency is to require reasonable notice (*r*).

**Termination of the Contract.**—The contract between master and servant may be discharged by operation of law in the same way as any other contract and, in particular, in the same way as a contract of agency.

So also it may come to an end by the dismissal of the servant or by his quitting his employment. But if it is so brought to an end unjustifiably the party not in fault will have a right of action.

**Dismissal of servant by notice.**—Where the contract is for a fixed time, *e.g.*, for a year, it comes to an end at the expiration of that time without notice (*s*). It cannot, moreover, in the absence of an express term to the contrary or a contrary

(*m*) *R. v. Great Bowden (Inhabitants)*, 7 B. & C. 249; *Turner v. Robinson*, 5 B. & Ad. 789. See also Bullen & Leake (10th ed.), p. 218.

(*n*) *Baxter v. Nurse*, 6 Man. & G. 935; 13 L. J. C. P. 82; *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J. Ex. 549.

(*o*) *Beeston v. Collyer*, 2 C. & P. 607; *Davies v. Marshall*, 4 L. T. 216.

(*p*) *R. v. Hampreston (Inhabitants)*, 5 T. R. 205.

(*q*) See Bullen & Leake (10th ed.), p. 218.

(*r*) *De Stempel v. Dunkels*, [1937] W. N. 117.

(*s*) *Langton v. Carleton*, L. R. 9 Ex. 57; 43 L. J. Ex. 54.

usage, be determined by notice before the expiration of the time (t).

In all other cases, if no length of notice is agreed, it is a rule of law that an agreement to give reasonable notice must be implied; but what is reasonable notice is in each case a question of fact (u), subject to any evidence as to usage in the particular class of employment (x). Reasonable notice may therefore vary from one month in the case of a stationery clerk (y) to twelve months in the case of an editor (z).

In the case, however, of a menial or domestic servant, there is a usage in case of a general hiring that the servant may at any time be dismissed by paying a calendar month's wages or giving a calendar month's notice (a). There is also a usage that the service may be determined at the end of the first month by notice given at or before the end of the first fortnight (b). Whether or not a servant is a menial or domestic servant is a question of law (c). The terms "domestic" and "menial" have the same meaning and are applicable to "servants, whose main or general function it is to be about their employers' persons, or establishments, residential or quasi-residential, for the purpose of administering to their employers' needs or wants, or to the needs and wants of those who are members of such establishments, or those resorting to such establishments" (d). Thus club servants such as cashiers, billiard markers, porters, housekeepers, engineers and

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(t) *Williams v. Byrne*, 7 Ad. & El. 177; 6 L. J. K. B. 239; *Metener v. Bolton*, 9 Ex. 518; 23 L. J. Ex. 130; *Buckingham v. Surrey & Hants Canal Co.*, 46 L. T. 885.

(u) *Green v. Wright*, 1 C. P. D., at p. 595; 46 L. J. C. P. 427; *Payzu, Ltd. v. Hannaford*, [1918] 2 K. B., at p. 850; 87 L. J. K. B. 1017.

(x) *Brennan v. Gilbert-Smith*, 12 T. L. R. 284.

(y) *Vibert v. Eastern Telegraph Co.*, 1 C. & E. 17.

(z) *Grundy v. Sun Printing Association*, 35 T. L. R. 77. See also *Lowe v. Walter*, 12 T. L. R. 358 (in which a jury found that six months was a reasonable notice in the case of a foreign correspondent of a newspaper), and *Power v. British India Steam Co.*, 46 T. L. R. 294 (in which it was held that, for the chief officer of an ocean passenger steamer, reasonable length of notice would be twelve months).

(a) *Fawcett v. Cash*, 5 B. & Ad., at p. 909; 3 L. J. K. B. 113; *Turner v. Mason*, 14 M. & W., at p. 116; 14 L. J. Ex. 111; *Phipps & Co. v. Rogers*, [1925] 1 K. B., at p. 23; 93 L. J. K. B. 1009.

(b) *George v. Davies*, [1911] 2 K. B. 445; 80 L. J. K. B. 924. Judicial notice may now be taken of this custom, which formerly was required to be proved in each case, see *Moult v. Halliday*, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451.

(c) *Nicoll v. Greaves*, 17 C. B. (N.S.) 27; 33 L. J. C. P. 259.

(d) *Re Junior Carlton Club*, [1922] 1 K. B. 166, at p. 170; 91 L. J. K. B. 85.

waiters have been held to be domestic servants (e). So also has a huntsman (f) and a head gardener (g), but not a farm bailiff (h), nor a governess (i).

*Dismissal of servant without notice.*—Such a dismissal is in point of law justifiable only if the servant has been guilty of conduct incompatible with the relationship of master and servant, not only during but even outside working hours, e.g., at a conciliation meeting (j); or with the due and faithful discharge of his duties, or if his conduct, even outside his service, is so immoral that he cannot be trusted (k); but not if he has been guilty merely of trivial misconduct, such as a single case of slight insolence or occasional neglect or a temporary absence (l).

There is, however, no rule of law defining the degree of misconduct which will justify dismissal without notice, and it is in each case a question of fact whether the degree of misconduct is inconsistent with the fulfilment of the express or implied conditions of service (m). Thus where a commercial traveller, whose duty it was to use a motor car for the purposes of his employer's business, was convicted of driving to the common danger and had his licence suspended for three months, it was held that his employer could not on this account dismiss him, for it was not of the essence of the contract that he should drive himself and he might have employed a chauffeur (n).

A person who is employed as a skilled servant may also be discharged without notice if he has not the necessary skill (o).

(e) *Id.*

(f) *Nicoll v. Greaves (ubi supra)*.

(g) *Noulan v. Ablett*, 2 C. M. & R. 54; 4 L. J. Ex. 155.

(h) *Louth v. Drummond* (cited in *Nicholl v. Greaves, supra*).

(i) *Todd v. Kerrich*, 8 Ex. 151; 22 L. J. Ex. 1.

(j) *Tomlinson v. L.M.S. Railway Co.*, [1944] 1 All E. R. 537, C. A.

(k) *Edwards v. Levy*, 2 F. & F. 97; *Callo v. Brouncker*, 4 C. & P. 518; *Pearce v. Foster*, 17 Q. B. D., at pp. 539, 540; 55 L. J. Q. B. 906; *Boston, etc., Fishing Co. v. Ansell*, 39 Ch. D. 339; and as to moral misconduct, see *Atkin v. Atton*, 4 C. & P. 208.

(l) *Edwards v. Levy*, *Callo v. Brouncker (ubi supra)*; *Filleul v. Armstrong*, 7 Ad. & E. 557; 7 L. J. Q. B. 7 (temporary absence). Compare *Turner v. Mason*, 14 M. & M. 112; 14 L. J. Ex. 311; *Churchward v. Chambers*, 2 F. & F. 229 (isolated instances of gross disobedience).

(m) *Baxter v. London and County Printing Works*, [1899] 1 Q. B. 901; 66 L. J. Q. B. 622; *Clouston & Co., Ltd. v. Corry*, [1906] A. C. 122; 75 L. J. P. C. 20; *Re Rubel Bronze, etc., Co. and Vos*, [1918] 1 K. B. 815; 87 L. J. K. B. 466; *Tomlinson v. L.M.S. Railway Co.*, (*ubi supra*).

(n) *Hinds v. Simpson, Fawcett & Co.*, 44 T. L. R. 295.

(o) *Harmer v. Cornelius*, 5 C. B. (N.S.) 236; 28 L. J. C. P. 85.

Permanent disability from illness or any other cause is also a sufficient ground for dismissal without notice (p), but not temporary disability, unless it is such as seriously to interfere with or frustrate the business purpose of the contract (q), or the contract of service expressly or impliedly excludes the right to wages during disability (r).

If in fact there was justification for the dismissal it is immaterial that it was unknown to the master at the time of the dismissal (s).

*Servant leaving without notice.*—A servant who unjustifiably leaves without giving proper notice commits a breach of contract. But justification for his so doing may exist through the conduct of the master, as, e.g., where the master treats him with unreasonable severity or cruelty (t). So also it may exist where the servant cannot continue in his employment without being subjected to some risk not contemplated by the contract of service, as, e.g., in case of a seaman, the extra risk incurred by an outbreak of war (u).

*Effects of termination.*—A servant properly dismissed without notice or unjustifiably leaving without notice does not forfeit any wages that have actually accrued due, but in the latter case the master may have a counterclaim for damages for breach of contract (w). Wages payable weekly, monthly, etc., accrue due at the end of each period, and a servant justifiably dismissed or unjustifiably leaving in the middle of a period, loses all the wages for that period (a).

(p) *Cuckson v. Stones*, 1 E. & E. 248; 28 L. J. Q. B. 25.

(q) *Poussard v. Spiers*, 1 Q. B. D. 410; 45 L. J. Q. B. 621; *Warburton v. Co-operative Society, Ltd.*, [1917] 1 K. B., at p. 668; 86 L. J. K. B. 529; *Ottoman Bank v. Chakarian*, [1930] A. C. 277; 99 L. J. P. C. 97.

(r) *Marrison v. Bell*, [1939] 2 K. B. 187; 108 L. J. K. B. 481; *Petrie v. MacFisheries, Ltd.*, [1940] 1 K. B. 258; 109 L. J. K. B. 263. In the later case of *O'Grady v. M. Saper, Ltd.*, [1940] 2 K. B. 469; 109 L. J. K. B. 785, it was suggested that there was no general rule and that the right of a servant to wages during illness depends in each case upon the express or implied terms of the contract. See, however, the *Law Quarterly Review*, vol. lvi, p. 10.

(s) *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171; 4 L. J. K. B. 157; *Willeys v. Green*, 2 C. & K. 59; *Boston, etc., Fishing Co. v. Ansell* (*ubi supra*).

(t) *Limland v. Stephens*, 3 Esp. 269; *Edward v. Trevellick*, 4 E. & B. 59; 24 L. J. Q. B. 9.

(u) *O'Neil v. Armstrong*, [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; *Liston v. Carpathian (Owners)*, [1915] 2 K. B. 42; 84 L. J. K. B. 1135.

(w) *George v. Davies* (*ubi supra*).

(a) *Walsh v. Walley*, L. R. 9 Q. B., at p. 369; 43 L. J. Q. B. 102; *Boston etc., Fishing Co. v. Ansell* (*ubi supra*).



A servant improperly dismissed without notice or justifiably leaving without notice is entitled *at most* (i) to the wages for the period during which his notice would have run; (ii) to any profits or commission which would probably have been earned by him during that time; and (possibly) (iii) to damages in respect of the time which might reasonably elapse before he could obtain other employment (y). In certain cases he may also be entitled to damages arising from the fact that he has not been given an opportunity of doing the work for which he was employed (z). But since his action is for breach of contract, and not for a tort, he is not entitled to damages as compensation for the manner of his dismissal, or for injury to his feelings, or for the loss he may sustain because the dismissal makes it more difficult for him to obtain fresh employment (a); and he is not necessarily entitled to the full wages for the unexpired period of his service, for the fact that he has obtained, or could have obtained, similar employment must be taken into consideration, and "the law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place and it is the duty of the servant to use diligence to find another employment" (b).

A domestic servant is, as a rule, entitled to one month's wages without board wages (c). Where, however, a domestic servant was wrongfully dismissed during the currency of a month's notice given by her, it was held that she was entitled not only to her wages until the end of the month, but also to board wages between the date of the dismissal and the date when the notice would have terminated (d).

A master is not bound to give his servant a character upon dismissal (e); and if he does so, any statements therein are privileged, though the privilege may be lost by malice.

(y) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488, at p. 493; 78 L. J. K. B. 1122. Tips which the servant would have received may be taken into account: *Manubens v. Leon*, [1919] 1 K. B. 208; 88 L. J. K. B. 811.

(z) *Post*, p. 519.

(a) *Addis v. Gramophone Co., Ltd.* (*supra*).

(b) *Beckham v. Drake*, 2 H. L. C., at p. 606; *Brace v. Calder*, [1895] 2 Q. B., at p. 259; 64 L. J. Q. B. 582.

(c) *Gordon v. Potter*, 1 F. & F. 644.

(d) *Lindsay v. Queen's Hotel Co., Ltd.*, [1919] 1 K. B. 212; 88 L. J. K. B. 535.

(e) *Carrol v. Bird*, 3 Esp. 201.

SUB-SECTION 2.—*The Duties of Master and Servant*

**The duties of master and servant.**—The rights, duties, and liabilities of master and servant depend upon the contract between them, except in so far as they are implied by law or custom (f), or created by express statutory enactment.

**Duties of master to servant.**—It is the duty of the master to employ and pay the servant in accordance with the contract. And where, for any particular employment, terms and conditions have been fixed for that employment by arbitration, the master must employ the servant upon those terms and conditions, *e.g.*, as to rates of pay, or upon terms and conditions not less favourable to the servant (g).

Whether or not an employer is bound actually to provide for the servant employment of the kind stipulated for in the contract is a question that depends upon the nature of the employment and upon whether, under the terms of the contract, the employer simply agrees to retain the services of the servant or agrees to give him the opportunity of doing the work for which he is engaged. No general rule has been laid down on this point but, on the one hand, it has been held that a salesman employed to solicit orders for a firm had no right of action merely because he was given no employment (h). On the other hand, it has been held that an actor employed to play a particular part, but given no opportunity of playing it, is entitled to damages for the loss of opportunity of enhancing his reputation by appearing in that part though not for any damage that his existing reputation may have suffered through the breach of contract (i). Moreover, where a servant is appointed to a specific office, *e.g.*, as a sub-editor of a newspaper, the master may be bound to employ him in that office during the contract period and not merely provide work for him (j). Where, however, a servant is paid by commission,

(f) *Hart v. Riversdale Mill Co.*, [1928] 1 K. B. 176; 96 L. J. K. B. 691; *Sugar v. H. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 810; 100 L. J. Ch. 220.

(g) Wages Councils Act, 1945: *Holland v. Sanders and Son*, [1944] 2 All E. R. 568, C. A.

(h) *Turner v. Sawdon & Co.*, [1901] 2 K. B. 658; 70 L. J. K. B. 897.

(i) *Clayton (Herbert) and Jack Waller v. Oliver*, [1930] A. C. 209; 99 L. J. K. B. 165; *Withers v. General Theatre Corporation*, [1933] 2 K. B. 536; 102 L. J. K. B. 719.

(j) *Collier v. Sunday Referee Publishing Co.*, [1940] 2 K. B. 647; [1940] 4 All E. R. 234.

the master is bound to give him an opportunity of earning his remuneration (*k*).

The payment of a servant's wages is in many cases subject to the provisions of the Truck Acts, whose main object was to check the existing practice of paying workmen by goods or compelling them to buy goods in the sale of which their employers had an interest.

By the *Truck Act*, 1881, it is provided that, subject to certain exceptions (*l*)—

- (i) any contract for the payment of the wages of a workman otherwise than in current coin,
- (ii) any provision in a contract between an employer and a workman respecting the place where, or the manner in which, or the person with whom any part of the workman's wages shall be expended,
- (iii) any payment of wages otherwise than in current coin, shall be illegal, null and void (*m*).

It is also provided that, subject to the same exceptions, a workman may recover from his employer any part of his wages that have not been paid in current coin (*n*).

Nothing in the Act, however, is to invalidate payment by bank-notes or, with the consent of the workman, by cheques on a bank within fifteen miles of the place of payment (*o*). The Act applies to any "workman" as defined by s. 10 of the *Employers and Workmen Act*, 1875, i.e., any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer, whether it is an express or implied contract and whether it is a contract of service, or a contract personally to execute any

(*k*) *Turner v. Sawdon & Co. (ubi supra)*; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247. See also *Re Rubel Bronze, etc., Co. and Vos*, [1918] 1 K. B. 315; 87 L. J. K. B. 466.

(*l*) Ss. 28, 24.

(*m*) Ss. 1, 2, 3. See also *Pratt v. Cook*, [1940] A. C. 437; 109 L. J. K. B. 293; explaining the distinction between wages payable otherwise than in cash, which are prohibited by s. 1, and wages payable in cash, from which, if the workman so authorises by a written agreement or contract, the price of certain matters supplied to him may be deducted under s. 23. In consequence of this decision the Truck Act, 1940, was passed in order to give relief from proceedings or penalties in cases where before the Act any part of wages was paid by the supply of what might lawfully have been supplied under an agreement valid under s. 23.

(*n*) S. 4.

(*o*) S. 8.

work or labour, not including, however, a domestic or menial servant (p).

The Act invalidates any deduction by the master from the servant's wages in order to pay a debt due to himself, even though it is a judgment debt (q). But a master may at the instance of the servant pay part of the servant's wages to a *third party* in discharge of some obligation of the servant to the third party.

So, in *Hewlett v. Allen* (r), a workwoman signed an agreement undertaking to conform with certain rules of her employers, one of which rules required all employees to become members of a sickness and accident club. The rules of this club required all members to pay a weekly subscription. The employers deducted this subscription from the woman's wages and paid it to the club. *Held*, that this was not a contravention of the Act.

The Act cannot be defeated by any "agreement, understanding, device, contrivance, collusion or arrangement whatsoever" (s).

Thus, in *Kenyon v. Darwen Cotton Manufacturing Co.* (t), the operatives employed by a company entered into agreements whereby shares in the company were allotted to them and were to be paid for by weekly deductions from their wages. An operative to whom shares had been allotted and from whose wages the agreed deductions had been made brought an action to recover them. The employers counterclaimed for the price of the shares. *Held*, (i) that the agreement was illegal, null and void; (ii) that the payment of wages otherwise than in current coin was also illegal, null and void; (iii) that the plaintiff could recover the deductions; (iv) that the contract for the purchase of the shares could not be severed from the illegal contract for payment of the purchase price out of the plaintiff's wages, and accordingly that the company could not recover on their counterclaim for the price of the shares (u).

But a deduction which, by contract, is made for the purpose of ascertaining the wages due to the workman is not within the Act of 1831. Thus a customary deduction for bad work is

(p) Truck Amendment Act, 1887. s. 2.

(q) *Williams v. North's Navigation Collieries*, [1906] A. C. 136; 75 L. J. K. B. 334.

(r) [1894] A. C. 383; 63 L. J. Q. B. 608.

(s) Truck Act, 1831, s. 25.

(t) [1936] 2 K. B. 198; 105 L. J. K. B. 342. See also *Penman v. Fife Coal Co.*, [1936] A. C. 45; 104 L. J. P. C. 74.

(u) See *ante*, p. 188.

not within that Act if it does not involve a diminution of wages ascertained and earned by the workman but is a deduction made in order to estimate the amount of wages due for his work (r). But by the *Truck Act*, 1896, an employer may not, unless certain conditions are complied with, make any contract with any workman for the deduction from the sum contracted to be paid to the workman, or for any payment to him by the workman—(i) in respect of any fine (w) or (ii) in respect of bad or negligent work or injury to the materials or other property of the employer, or (iii) in respect of the use of materials, tools, machines, light, heat, etc. (x).

The Secretary of State may, however, by order, grant an exemption from the provisions of the Act of 1896 in respect of persons engaged in any particular business, either generally or within a specified area (y).

There are also other statutes, which are outside the scope of this book, by which deductions from wages are prohibited or regulated (z).

Where by agreement a master can make a deduction from his servant's wages on the breach by him of any regulations, the servant must have an opportunity of being heard before the deduction is made (a).

The payment of wages in licensed premises, except by the owner or occupier to persons *bona fide* employed therein, is prohibited by the *Payment of Wages in Public-houses Prohibition Act*, 1888.

In the absence of agreement to that effect a master is not bound to supply his servant with food, clothing, lodging or medical aid (b). If, however, a master calls in his own medical attendant to attend a servant, he cannot deduct payment therefor out of the servant's wages unless there is a special contract

(v) *Hart v. Riversdale Mill Co.* (*ubi supra*); *Sagar v. H. Ridehalgh & Son, Ltd.* (*ubi supra*).

(w) But the suspension of a workman, without wages, as a punishment for serious misconduct, pursuant to a term in his contract of employment, is not a deduction from wages nor payment in respect of a fine: *Bird v. British Celanese, Ltd.*, [1945] K. B. 386; 114 L. J. K. B. 184; [1945] 1 All E. R. 488, C. A.

(x) *Id.* ss. 1–3.

(y) *Id.* s. 9.

(z) As, e.g., the *Factory and Workshop Acts* and the *Hosiery Manufacture (Wages) Act*, 1874.

(a) *Armstrong v. South London Tramways Co.*, 64 L. T. 96.

(b) *Wennall v. Adney*, 8 B. & P. 247; 6 R. R. 780.

between them to that effect (c) and, in the case of a workman, the contract is in writing (d).

There is no Common Law right to wages during absence through illness. Whether or not a servant is entitled to his wages when through illness he is unable to work depends upon the express or implied terms of his employment (e). The question is one of fact in each case (f). "Were they in agreement that the man should be paid when ready and willing to work or only that he should only be paid when he was actually working. It depends upon the evidence what the terms were" (g). The fact that the servant receives benefits under the National Insurance Act, 1946, does not deprive him of his right to wages.

*Duties of servant to master.*—It is the duty of the servant to perform the work for which he is employed and in performing it to use reasonable skill and care, and if he is guilty of a breach of this duty an action for negligence will lie against him or a claim by the master can be set off in an action brought by the servant for his wages (h). The servant is also under a similar duty to obey all lawful orders of his master, but no order is lawful if obedience to it will involve danger by violence or disease to the person of the servant (i). Furthermore, the right to suspend for breaches of discipline by the servant may be shown to be an implied term of the contract of employment (k).

During his service the servant must act with fidelity to his master and is in the same position as an agent with regard to the disclosure of information which has been confidentially obtained (l). Thus he may not, while still in the service of his master, canvass his master's customers with a view to obtaining their custom when he sets up in business on his own account (m). Moreover, a servant who does work in his spare

(c) *Sellen v. Norman*, 4 C. & P. 80.

(d) Truck Act, 1881, s. 28.

(e) *Petrie v. MacFisheries, Ltd.*, [1940] 1 K. B. 268; 109 L. J. K. B. 263; *O'Grady v. Saper*, [1940] 2 K. B. 469; 109 L. J. K. B. 785.

(f) *O'Grady v. Saper* (*ubi supra*).

(g) [1940] 2 K. B., at p. 474. See also *ante*, p. 517.

(h) See *Keates v. Lewis Merthyr Consolidated Collieries, Ltd.*, [1911] A. C. 641; 80 L. J. K. B. 1318; *Sagar v. H. Ridehalgh & Son, Ltd.* (*ubi supra*).

(i) *Bouzourou v. Ottoman Bank*, [1930] A. C. 271; 99 L. J. P. C. 176; *Ottoman Bank v. Chakarian*, [1930] A. C. 277; 99 L. J. P. C. 97.

(k) *Marshall v. English Electric Co.*, [1945] 1 All E. R. 658, C. A.

(l) *Ante*, p. 462, and see *Merryweather v. Moore*, [1892] 2 Ch. 518; 61 D. J. Ch. 505; *Bento Brewery Co. v. Hogan*, [1945] 2 All E. R. 570.

(m) *Wessex Dairies v. Smith*, [1935] 2 K. B. 80; 104 L. J. K. B. 484.

time may be in breach of his duty of fidelity to his employer depending upon the nature of his employer's business and that which the servant does in his spare time (n). And if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself in the sense that the facilities or position which he enjoys are the real cause of his obtaining the money, then he is accountable to his master. Thus, where a British Army sergeant obtained money by riding in full uniform in an Egyptian lorry so that it had the appearance of a military escort and thereby escaped examination by the civilian police, he was held accountable to the Crown, because the only reason he obtained the money was the uniform of the Crown and his position as a Crown servant (o). Furthermore a service agreement itself may, in effect, make the servant a trustee of his inventions and place him under a continuing obligation, even after his agreement has ended, to take all necessary steps to vest them in his employer (p).

The remedy of specific performance is not applicable to contracts for personal services (q); but a master may obtain an injunction restraining a servant from doing that which he has expressly stipulated not to do, *e.g.*, from breach of an express agreement that he will not, during the continuance of his employment, do similar work for any other master (r).

Disputes between masters and workmen, when the amount claimed does not exceed £10, may be heard by a Court of summary jurisdiction (s).

## SECTION 2.—*Injuries to a Servant whilst in his Master's Employment*

The position of a servant who is injured in his employment has to be considered under two heads, *i.e.* :—

- (1) the position at Common Law;
- (2) the position by Statute.

(n) *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.*, [1946] Ch. 169; [1946] 1 All E. R. 350. A case where the employee in his spare time was working for a trade competitor of his employer.

(o) *Re Reading's Petition of Right*, [1949] 2 All E. R. 68, C. A.

(p) *British Celanese Ltd. v. Moncrieff*, [1948] Ch. 564; [1948] 2 All E. R. 44.

(q) *Frith v. Frith*, [1906] A. C., at pp. 261, 262; 75 L. J. P. C. 50.

(r) *Lumley v. Wagner*, 1 De G. M. & G. 604; 21 L. J. Ch. 898.

(s) Employers and Workmen Act, 1875, s. 4. The Act does not apply to domestic servants: s. 10.

SUB-SECTION 1.—*The Position at Common Law*

At Common Law a servant was and still is deemed to take the ordinary risks of the work for which he was employed and the master was and still is liable only for injury caused to his servant by his negligence (t). Thus while at Common Law he is not under an absolute obligation to provide competent fellow-servants or safe premises or plant or a safe system of working, he is liable for injury caused to his servants:—

- by his own negligent acts or orders (u);
- by want of reasonable care in the selection of fellow-servants (a);
- by failure to take reasonable care to instruct the servant in the handling of dangerous machinery or the execution of dangerous work (b);
- by failure to take reasonable care and to use reasonable skill to provide and maintain proper machinery, plant, appliances and works (c), to select properly skilled persons to manage and superintend the business and to provide a proper system of working (d);
- by the breach of any statutory duty imposed upon him for the protection of his servants (e).

And, with respect to the provision and maintenance of proper machinery, plant, appliances or works and the performance of statutory duties the obligations of the master are not discharged merely by the appointment of competent foremen, overseers and agents (f).

(t) See *Wilson v. Merry*, L. R. 1 H. L. (Sc.), at p. 352.

(u) *Ashworth v. Stanwix*, 8 E. & E. 701; 90 L. J. Q. B. 183; *Roberts v. Smith*, 2 H. & N. 213; 26 L. J. Ex. 319.

(a) *Tarrant v. Webb*, 18 C. B., at p. 805; 25 L. J. C. P. 261.

(b) *Young v. Hoffman Manufacturing Co.*, [1907] 2 K. B., at p. 656; 76 L. J. K. B. 998.

(c) Moreover, this obligation to maintain extends to cover all such acts as are normally and reasonably incidental to the day's work, and is not confined to those precise acts which the workman is employed to perform: *Davidson v. Handley Page Ltd.*, [1945] 1 All E. R. 235, C. A.: (slipping on a duck-board when going to wash a tea-cup).

(d) *Wilsons & Clyde Coal Co. v. English*, [1938] A. C. 57; 106 L. J. P. C. 117. A master does not discharge his obligation to provide a proper system of working by laying down a general system of working for a type or class of job and leaving it to the discretion of the person in charge of a particular job to decide what modifications should be made in the system to meet special circumstances or eventualities which may exist or arise—see *Coljar v. Coggins*, [1945] A. C. 197, and *Porter v. Port of Liverpool Stevedoring Co. Ltd.*, [1944] 2 All E. R. 411.

(e) *Butler v. Fife Coal Co.*, [1912] A. C. 149; 81 L. J. P. C. 97.

(f) *Wilsons & Clyde Coal Co. v. English* (ubi supra).



This liability which rests upon the master is, however, limited to the servant's *physical* safety and does not include any liability to safeguard against theft of the servant's property which may be upon the master's premises (g).

Since this action by the servant against his master is an action of negligence, the master *could at one time* set up against the servant any defence available in an ordinary action of negligence. These were :—

(a) *The Defence of Common Employment.*

At Common Law, since a servant was deemed to accept the ordinary risks incidental to the work for which he was employed, the negligence of a fellow-servant in the master's employment was held to be an ordinary risk (h). Hence, where a servant sustained an injury by the negligence of another servant engaged under the same master, even though the servants were engaged in different departments, their common employer was not liable. For "the doctrine of common employment", as this was called, to apply, however, there had to be both a common employer and also a common employment, *i.e.*, employment which "necessarily and naturally or in the usual course involves juxtaposition, local or casual, of the fellow-employees and exposure to the risk of the negligence of the one affecting the other" (i). The doctrine had its origin in the case of *Priestley v. Fowler*, 1887 (j), where the plaintiff, a butcher's boy, was injured by the collapse of his master's van in which he was travelling; the accident was due to negligence in overloading the van. It was held that the master was not liable.

The defence of Common Employment, unpopular with both workers and employers alike, was considerably modified by the Employers' Liability Act, 1880 (k). The Workmen's Compensation Acts, 1925 to 1945 (l), to some extent made the

(g) *Deyong v. Shenburn*, [1946] K. B. 227 : [1946] 1 All E. R. 226. Though in deciding whether an employer has complied with his *statutory* duty to provide his employees with "adequate and suitable accommodation for clothing not worn during working hours" under s. 43 (1) of the Factories Act, 1937, the risk of theft is an element to be taken into consideration : *McCarthy v. Daily Mirror Newspapers*, [1949] 1 All E. R. 801, C. A.

(h) See *Radcliffe v. Ribble Motor Services, Ltd.*, [1959] A. C. 215, where the history of the doctrine is fully discussed.

(i) *Radcliffe v. Ribble Motor Services, Ltd.* (*ubi supra*) at p. 249.

(j) 3 M. & W. 1; 7 L. J. Ex. 42.

(k) *Infra*, p. 531.

(l) *Infra*, p. 531.

employer an insurer of his servants against personal injury, thus further restricting the effect of the doctrine.

By the Law Reform (Personal Injuries) Act, 1948, the defence of common employment is abolished altogether (*m*), and since this defence is abolished the need for the Employers' Liability Act, which modified the doctrine, disappeared and it is accordingly repealed by the same Act (*n*). The Act provides that when the cause of action accrues on or after July 5, 1948, it shall be no defence to an employer who is sued in respect of personal injury (*o*) caused by the negligence of a person employed by him, that that person was at the time the injuries were caused in common employment with the person injured (*p*). Any provision in a contract of service or apprenticeship is void so far as it excludes or limits any liability of the employer in respect of personal injuries caused to the person employed or apprenticed, by the negligence of persons in common employment (*q*). The Act is binding on the Crown (*r*).

Before the passing of the Law Reform (Personal Injuries) Act, 1948, a person who, without the master's knowledge, voluntarily assisted the master's servants in the performance of their work was, as regards the master, in no better position than he would have been had he been a servant proper, i.e., he could, if injured by the master's servants, be met by the defence of common employment (*s*). The position was different and the volunteer could recover where he had a common interest with the master in the work with which he assisted, e.g., where the master's servants were unloading coal delivered by the master to the volunteer in the master's wagons (*t*). Now, with the abolition of the doctrine of common employment, the attitude which the Courts will adopt as to volunteer workers is obscure. The position of such a person will probably henceforth depend upon ordinary common law considerations of liability, i.e.:

- (a) on whether it can be said that the volunteer was an invitee, licensee or a trespasser, when the master's

(*m*) S. 1 (1).

(*n*) S. 1 (2).

(*o*) By s. 8 "personal injury" includes any disease and any impairment of a person's physical or mental condition.

(*p*) Ss. 1 (1), 6 (2).

(*q*) S. 1 (3).

(*r*) S. 4.

(*s*) *Degg v. Midland Ry.*, [1857] 1 H. & N. 773.

(*t*) *Holmes v. N. E. Ry.*, [1869] L. R. 6 Ex. 123; *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K. B. 899.

liability will be gauged according to this classification (u);

- (b) on whether, if the plaintiff has interfered, without invitation, to do risky work in which he has no interest, he may be met by the defence of *Volenti non fit injuria* (a).

(b) *The Defence of Volenti non fit injuria.*

It is a defence to an employer to show that the servant was cognisant of the full extent of the danger and voluntarily ran the risk (b).

It must be noted that this maxim is not “*Scienti non fit injuria*”, but “*Volenti*”; there may be a perception of the danger without comprehension of the risk; there may also be acts which justify the inquiry whether the risk, though known, was encountered voluntarily (c).

Whether or not the servant was *volens* “is a question of fact to be decided on the circumstances of each case”, and “in considering such a question the circumstance that the servant has entered into, or continued in, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him” (d). The master in order to raise the defence of *volenti*, must show that the servant agreed to run the risk and to the absence of precautions (e). The maxim can hardly ever be applicable where the act to which the servant is said to be “*volens*” arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved.

And “if nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may . . . properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself. In such a case fear of dismissal, rather than voluntary action, might properly be inferred” (f).

(u) *Ante*, p. 381.

(a) *Infra*.

(b) *Thomas v. Quartermaine*, 18 Q. B. D., at p. 695; 56 L. J. Q. B. 340.

(c) *Id.*, at p. 696.

(d) *Smith v. Baker & Sons*, [1891] A. C. 325; 60 L. J. Q. B. 683; *Williams v. Birmingham Battery, etc., Co.*, [1899] 2 Q. B., at p. 345; 68 L. J. Q. B. 18.

(e) *Bowater v. Rowley Regis Corp.*, [1944] K. B. 476; 170 L. T. 814.

(f) *Yarmouth v. France*, 19 Q. B. D., at p. 601; 57 L. J. Q. B. 7. See also *Baker v. James Brothers & Sons, Ltd.* (*ubi supra*).

The defence of *Volenti non fit injuria* cannot be set up where injury has been caused to a servant through the breach by the master of a duty imposed upon him by statute (g).

(c) *The Defence of Contributory Negligence.*

The master can set up the defence that, although the injury to the servant is a consequence of his negligence, yet it is also due to contributory negligence (h) on the part of the servant, i.e., that the servant's negligence *materially* contributed to occasion the injury of which he complains. And the master may set up this defence even though the injury was caused by a breach of a statutory duty (i). The rule at Common Law was that a servant could not recover if the injury of which he complained occurred through the combined negligence of both himself and the master. If the master proved that the servant's injury occurred by such combined negligence the master was freed from *all* liability.

This rule was changed by the Law Reform (Contributory Negligence) Act, 1945 (k), under which the damages are now divided in proportion to the respective degree of fault and the servant is entitled to recover damages reduced in amount to the extent of his own negligence. So long as the servant's negligence had some share in causing the accident, some proportion of the damages should be awarded against him (l).

But before a servant will be guilty of contributory negligence he must have failed to use that degree of care which an ordinary prudent workman would have shown in the particular circumstances (m). It must be borne in mind that a different degree of care may well be expected from a workman whose employment is fraught with noise, strain and continuous risk from that which could be expected of an ordinary man whose employment is not exacting.

“What is all important is to adapt the standard of negligence to the facts, and to give due regard to the condition under which men work . . . to the long hours and the fatigue

(g) *Baddeley v. Granville (Earl)*, 19 Q. B. D. 423; 56 L. J. Q. B. 501; *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669; 103 L. J. K. B. 17.

(h) *Ante*, p. 378.

(i) *Caswell v. Powell Duffryn Collieries, Ltd.*, [1940] A. C. 152; *Cakebread v. Hopping Bros. (Whetstone)*, [1947] K. B. 641.

(k) *Ante*, p. 378.

(l) *Lavender v. Diamints, Ltd.*, [1949] 1 K. B. 585; [1949] 1 All E. R. 532.

(m) *Gibbs v. East Grinstead Gas and Water Co.* [1944] 1 All E. R. 356

to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise, and confusion in which the man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety" (n).

A servant's error of judgment, inadvertence or forgetfulness is not contributory negligence (o). Nor is mistake made by the workman if due to inadvertence, hurry, absorption in work or fatigue. Again, if a workman takes something for granted when there is nothing to put him on enquiry it is not necessarily negligence (p), or if he follows an existing system for doing a particular job even though there be an element of risk (q).

On the other hand, disobedience to orders (r), failure to use safety equipment provided (s), and disregarding obvious dangers (t), are *prima facie* contributory negligence in the servant.

The present position then, at Common Law, is that where a servant sues his master for negligence, the servant may still be met by the complete defence of *Volenti non fit injuria* and the qualified defence of contributory negligence.

In any such action, in assessing the damage for personal injuries caused to a servant, one-half the value of any rights which have or will accrue to the injured person for industrial disablement or sickness benefit under the National Insurance Acts, 1946 (u), for five years beginning when the cause of action accrued, must be taken into account. And any such benefits will, to that extent, reduce any loss of earnings or profits which the injured servant has already or probably will suffer (a). But when any question of contributory negligence under the Law Reform (Contributory Negligence) Act, 1945 (b) arises, any apportionment of damages must operate upon the total damage before any such benefits are taken into

(n) *Caswell v. Powell Duffryn Collieries, Ltd.* (*supra*), at pp. 176-178.

(o) *Steel v. Glasgow Iron and Steel Co.*, [1944] S. C. 237.

(p) *Grant v. Sun Shipping Co., Ltd.*, [1948] A. C. 549; [1948] 2 All E. R. 238.

(q) *Baico v. Brighton Corporation*, [1949] 1 K. B. 389; [1949] 1 All E. R. 251.

(r) *Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd.*, [1936] A. C. 206.

(s) *Gibby v. East Grinstead Gas and Water Co.*, [1944] 1 All E. R. 358.

(t) *Craze v. Meyer-Dunmore Bottlers' Equipment Co., Ltd.*, [1936] 2 All E. R. 1150.

(u) S. 2 (1) of the Law Reform (Personal Injuries) Act, 1948.

(a) S. 3 (1) of the Law Reform (Personal Injuries) Act, 1948.

(b) *Supra*, p. 378.

account (c). Furthermore, in assessing damage to the servant, the fact that certain expenses could be avoided by him by availing himself of the facilities of the National Health Service Act, 1946, is to be disregarded (d).

**SUB-SECTION 2.—*The Position by Statute***

As was stated above (e), the Employers' Liability Act, 1880, modified the doctrine of common employment. This Act provided that where personal injury was caused to a workman (a domestic servant and a person not engaged in manual labour were excluded) he or his personal representative were given the right to compensation as if he had not been a workman or servant of the employer. The injury had to be caused by:—

- (i) a defect on the employer's premises or machinery, which defect had not been remedied because of the employer's negligence;
- (ii) the negligence of the employer's superintendent or of any person to whose orders the workman at the time of the injury must and did conform;
- (iii) the act or omission of any person, in the employer's service, acting in obedience to the employer's improper or defective rules or by-laws;
- (iv) the negligence of any person, in the employer's service, who had charge or control of signals, points, engines or locomotives.

But in no case could the workman recover if he knew of the defect or negligence which caused his injury and failed to give his employer notice thereof, unless the workman knew that his employer already knew of it. The maximum compensation recoverable by the workman was an amount equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade in the like employment in the same district. Proceedings could not be brought by the workman unless notice of the injury had been given within six weeks and the action was commenced within six months from the date of the accident or, in case of death, when absence of notice was no bar, within twelve months. The workman could contract out of the Act.

The Workmen's Compensation Acts, 1925 to 1945, made an employer, with some limitations, an insurer of his "workmen".

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(c) S. 8 (8) of the Law Reform (Personal Injuries) Act, 1918.

(d) *Ibid.*, s. 3 (4).

(e) At p. 526.

"Workmen" included any person working under a contract of service or apprenticeship with an employer except:—

- (i) a person employed otherwise than by way of manual labour whose remuneration exceeded £400 a year;
- (ii) a person whose employment was of a casual nature and who was employed otherwise than for the purpose of the employer's trade or business;
- (iii) a member of the police force;
- (iv) an outworker;
- (v) a member of the employer's family dwelling in his house.

The Acts provided that if in any employment personal injury by accident (f) arising out of (g) and in the course of (h) the employment was caused to the workman, his employer was liable to pay compensation as provided by the Act unless the injury was due to the serious and wilful misconduct of the workman (save where death or permanent disablement resulted). The compensation was payable to or for the benefit of the workman or, where death resulted, to his dependents. Where death resulted the compensation was a lump sum not exceeding £400 or, if the workman left dependents, £700. Where total or partial incapacity resulted the compensation was a weekly sum of 80s. payable during incapacity together with supplementary allowances for himself and any children under 15 years of age. Proceedings for the recovery of compensation under this Act were not maintainable unless notice of the accident had been given as soon as practicable after the accident happened and before the workman voluntarily left the employment, and the claim for compensation had to be made within six months of the accident or death. No agreement could deprive a workman of his rights under this Act.

The Employers' Liability Act, 1880, was repealed by the Law Reform (Personal Injuries) Act, 1948 (i). The Workmen's Compensation Acts, 1925 to 1945, were repealed by the National Insurance (Industrial Injuries) Act, 1946, though the former

(f) "Accident" included any unexpected injury resulting from any unlooked for mishap or occurrence.

(g) The test whether the injury arose "out of" the employment was: was it part of the injured person's employment to hazard, suffer or do that which caused his injury?

(h) The injury arose "in the course of" the employment if it occurred during the employment and whilst the workman was doing something his employer could and did, expressly or by implication, employ him to do or order him to do.

(i) *Supra*, p. 527.

Acts will continue to apply to injuries which occurred before July 5, 1948.

*The National Insurance (Industrial Injuries) Act, 1946*, substitutes for the provisions set out above a system of industrial insurance by the State. It provides that all persons in insurable employment must be insured against personal injury caused on or after July 5, 1948, by accident arising out of and in the course of such employment (k). Where such injury occurs, benefit is payable to the injured person and, in order to provide for benefits which are paid out of a fund called the Industrial Injuries Fund, every insured person and his employer must pay weekly contributions, unless exempted (l), and the Exchequer provides one-fifth of the aggregate (m). Contributions are paid by stamps affixed to insurance cards.

1. *Insurable Employment* under the Act means employment under an express or implied contract of service (n) except certain employments excepted by Schedule I, Part II, of the Act, e.g., part-time employees of local authorities, employment of a casual nature or in certain ships or aircraft.

2. *By Accident*. "Accident" includes "any unexpected personal injury resulting to the workman from any unlooked-for mishap or occurrence" (o). Thus it includes:—

- (i) any injury caused by an accident, such as a fall, or lightning (p), or the bite of an animal (q) or of an insect (r);
- (ii) an injury which is the result of the work itself, such as a rupture caused by exertion in the ordinary course of work (s);
- (iii) disease due to the nature of the employment (t), e.g., anthrax contracted by a wool sorter or dermatitis contracted by a fur dyer. A person who is insured under

(k) *The National Insurance (Industrial Injuries) Act, 1946*, s. 1 (1).

(l) See "Insurable Employment", *infra*.

(m) S. 2.

(n) S. 7 (1).

(o) *Fenton v. Thorley & Co., Ltd.*, [1908] A. C., at p. 451.

(p) *Andrew v. Paisworth Industrial Society*, [1904] 2 K. B. 32; 73 L. J. K. B. 510.

(q) *Rowland v. Wright*, [1904] 1 K. B. 693; 77 L. J. K. B. 1071.

(r) *Amy v. Barton*, [1912] 1 K. B. 40; 81 L. J. K. B. 65.

(s) *Fenton v. Thorley* (*ubi supra*).

(t) S. 55 (1).



the National Health (Industrial Injuries) Act, 1946, against personal injury is also insured against those diseases which are prescribed under s. 55 (u).

The expression "unexpected" means unexpected to the workman. The term "accident" may therefore include a premeditated injury inflicted on the workman, *e.g.*, there is injury by accident, where a cashier, whilst taking money from his employer's office to a colliery to pay the miners, was robbed and murdered (a). The insured person or someone on his behalf must give notice to the employer as soon as practicable after the accident (b) and the employer must investigate and furnish information to the insurance officer.

### 8. Out of and in the course of such employment.—

[These words in s. 1 (1) of the National Insurance (Industrial Injuries) Act, 1946, are identical with those used in s. 1 of the Workmen's Compensation Act, 1925 (c). It is thought that the interpretation placed upon them by the Courts in deciding workmen's compensation cases before 1946 will be applicable in interpreting the identical provision in the 1946 Act. Accordingly the meaning and scope here given to these words will be the same as that given them under the 1925 Act.]

The term "employment" means the work which the man is employed to do and what is incidental to it (d). The injury by accident must have arisen both out of and in the course of that employment.

The first essential is that it should have happened "*in the course of the employment*", that is to say, it must have occurred during the employment of the workman, and while he was doing something that his employer could and did, expressly or by implication, employ him to do or order him to do (e).

The expression "*in the course of the employment*" does not, on the one hand, mean merely during the currency of the time of the engagement; thus, for example, the service of a domestic servant who sleeps and takes his meals in his master's house is interrupted if he goes out on his own business or pleasure (f).

(u) They are contained in SI 1948, No. 1371, as amended by SI 1949, Nos. 230 and 1697.

(a) *Nisbet v. Rayne and Burn*, [1910] 1 K. B. 689; 80 L. J. K. B. 84.

(b) *Ss. 25 (1), 26.*

(c) *See ante*, p. 532.

(d) *Davidson v. McRobb*, [1918] A. C., at p. 314; 87 L. J. P. C. 58; *St. Helens Colliery v. Hewitson*, [1924] A. C., at p. 74; 93 L. J. K. B. 177.

(e) [1924] A. C., at pp. 91, 92.

(f) *Davidson v. McRobb*, [1918] A. C., at pp. 314, 315, 321.

On the other hand, the term "employment" is not confined to the actual work which the man is employed to do; it may begin before he has actually commenced his work, and may continue after the termination of his work, as, for example, while for the purpose of getting to or leaving his work he is in another part of his employer's premises (g) or any means of access thereto which he is only entitled to use by virtue of his employment, as, e.g., a railway platform which he is entitled to use only for the purpose of going to and coming from his work (h), or if, by virtue of his contract of service, he is under an *obligation* or *necessity* to use a particular means of transit to or from his work (i), or particular lodgings (k). So also the employment of a workman may continue during a legitimate interruption, as, e.g., when he is taking a meal on his employer's premises (l) or "merely standing by, waiting for the next job" (m).

It should be noticed that, under the 1946 Act, where a workman can show that his injury arose in the course of his employment, the onus shifts from him, for an accident arising in the course of his employment is deemed, in the absence of evidence to the contrary, also to have arisen out of that employment (n).

The second essential is that the accident should arise "*out of the employment*". As to this a frequently cited test is—"Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?" (o). If the workman was in fact doing that which he was employed to do he is not debarred from compensation merely because he was doing it imprudently or disobediently. For an accident is deemed to

(g) *Stewart & Son v. Longhurst*, [1917] A. C. 249; 86 L. J. K. B. 729.

(h) *Weaver v. Tredegar Iron & Coal Co.*, [1940] A. C. 955; 109 L. J. K. B. 621.

(i) *St. Helens Colliery v. Hewitson* (*ubi supra*). It is not sufficient that he has a mere right or privilege to use that means of transit (*id.*).

(k) *London and North Eastern Ry. v. Brentnall*, [1933] A. C. 489; 102 L. J. K. B. 438. Compare *Alderman v. Great Western Ry.*, [1937] A. C. 454; 106 L. J. K. B. 335. Here a ticket collector had to travel from Oxford to Swansea (where he stayed the night) and from Swansea to Paddington. Between signing off and signing on again at Swansea he was free to do what he liked and lodge where he wished provided that he acquainted the Swansea station with his address. While walking to his work from lodgings chosen by him he slipped and broke his ankle. *Held*, that the accident did not arise out of his employment.

(l) *Blowett v. Sawyer*, [1904] 1 K. B. 271; 73 L. J. K. B. 155; *Redford v. Armstrong Whitworth & Co., Ltd.*, [1920] A. C. 757.

(m) *St. Helens Colliery v. Hewitson*, *ubi supra*, at p. 91.

(n) S. 7 (4) of the 1946 Act.

(o) *Lancashire and Yorkshire Ry. v. Highley*, [1917] A. C., at p. 372; 86 L. J. K. B. 715.

arise out of and in the course of an injured person's employment, notwithstanding that he is at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he is acting without instructions from his employer if :—

- (a) the accident would have been deemed so to have arisen had the act not been done in contravention as aforesaid or without instructions from his employer as the case may be; and
- (b) the act is done for the purpose of and in connection with the employer's trade or business (p).

But there is a difference between imprudence and disobedience in the *mode* of doing work which the man is employed to do and imprudence or disobedience which carries a man outside the *sphere* of his employment (q). And if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do or is put outside the range of his service by a genuine prohibition, then any risk which he incurs by doing it is not a risk of the employment but an "added peril" voluntarily superinduced by the workman on the risks arising out of the employment (r). "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere (s). Thus, an accident does not arise out of the employment if it is due to a risk caused by the workman—

- by arrogating to himself duties which he was not employed to perform (t);
- by going to forbidden territory (u);

(p) S. 8 of the 1946 Act.

(q) *Barnes v. Nunnery Colliery Co., Ltd.* (*ubi supra*).

(r) *Id.*, [1912] A. C., at p. 47.

(s) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A. C., at p. 67; 83 L. J. K. B. 197; *Lancashire, etc., Ry. v. Highley*, [1917] A. C., at pp. 361, 371, 372; *Stephen v. Cooper*, [1929] A. C. 570; 98 L. J. K. B. 97.

(t) *Wilson's, etc., Coal Co. v. M'Ferrin*, [1926] A. C. 377.

(u) See *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A. C., at p. 66; *Herbert v. Samuel Fox & Co., Ltd.*, [1916] 1 A. C., at p. 420; 85 L. J. K. B. 441; *Davies v. Gwauncaeagurwen Colliery*, [1924] 2 K. B., at p. 668; 94 L. J. K. B. 229.

- by disobeying a prohibition which limits the sphere of his employment, unless such disobedience is habitually winked at by the employer (x);
- by deviating from his duty for his own pleasure or purposes (y);
- by doing an act in so unreasonable and negligent a way as to turn it into a different act from that which he was employed to do (z).

However, an accident happening to an insured person in or about any premises at which he is for the time being employed for the purposes of his employer's trade or business is deemed to arise out of, and in the course of, his employment if it happens while he is taking steps on an actual or supposed emergency at those premises, to rescue, succour or protect persons who are, or are thought to be or possibly to be, injured or imperilled, or to avert or minimise serious damage to property (a).

Assuming, however, that the workman was acting in the sphere of his employment, an accident arises out of that employment if it results from some special danger due to the nature, conditions, obligations or incidents of his service (b). The expression "arising out of" imports some kind of casual relation with the employment, but it does not logically necessitate direct or physical causation; it is sufficient if there has been injury by accident arising out of what the workman had to do, merely because of the conditions of his employment (c). Thus—

In *Thom v. Sinclair* (d), a woman was employed to work in a shed. A brick wall which was being built on premises adjoining those of her employer fell upon the shed which tumbled in and injured her. *Held*, that there was an accident arising out of her employment because it was part of the conditions of her service that she should occupy this place of work which turned out to be a place of special danger. Her service there brought her into the position of being subjected to this peril.

In *Upton v. Great Central Ry.* (e), a workman in the employment of a railway company was directed to travel by

(x) *Barnes v. Nunnery Colliery Co.*, [1912] A. C., at p. 51; see also *Lancashire, etc., Ry. v. Highley* (*ubi supra*).

(y) *Smith v. Lancashire and Yorkshire Ry.*, [1899] 1 Q. B. 145; 68 L. J. Q. B. 51; *Reed v. Great Western Ry.*, [1909] A. C. 81; 78 L. J. K. B. 31.

(z) *Lancashire, etc., Ry. v. Highley* (*ubi supra*); *Guest v. Gaston & Co.*, [1927] 1 K. B., at pp. 12, 13; 95 L. J. K. B. 759.

(a) S. 10 of the 1946 Act.

(b) *Thom v. Sinclair*, [1917] A. C., at p. 142; 86 L. J. P. C. 102.

(c) *Upton v. Great Central Ry.*, [1924] A. C., at pp. 306, 307; 93 L. J. K. B. 224.

(d) *Ubi supra*.

(e) *Ubi supra*.

train from A station to B station to do certain work near B station. After finishing his work he returned to B station in order to take the train back to A station. When the train came in he hurried across the platform to reach the proper carriage and slipped and injured his knee. *Held*, that the accident arose out of his employment.

And, if the risk is one which arises out of the employment, it is immaterial that the same risk is shared by other members of the public who are not so employed; thus, if in the course of his employment a workman is required to incur dangers of the streets, those dangers are risks of his employment, although shared by all members of the public (f).

It is expressly enacted that an accident happening while an insured person is, with the express or implied permission of his employer, travelling as a passenger by any vehicle to or from his place of employment is to be deemed, notwithstanding that he is under no obligation to his employer to travel by that vehicle, to arise out of and in the course of his employment, if:—

- (a) the accident would have been deemed so to have arisen had he been under such an obligation; and
- (b) at the time of the accident, the vehicle is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer, and is not being operated in the ordinary course of a public transport service (g).

But a risk arising from natural causes such as severe weather or lightning is not a risk of the employment unless the character of the employment intensifies the risk and makes it greater than the ordinary normal risk to which other persons in the neighbourhood, not similarly employed, are exposed (h).

#### 4. Benefit.

There are three types of industrial benefit:—

##### (a) Injury Benefit.

An insured person under the National Insurance (Industrial Injuries) Act, 1946, is entitled to injury benefit in respect of any day on which, as a result of the industrial injury, he is

(f) *Dennis v. White*, [1917] A. C. 479; 86 L. J. K. B. 1074; *Lawrence v. George Matthews, Ltd.*, [1929] 1 K. B. 1; 97 L. J. K. B. 758.

(g) S. 9 (1) of the 1946 Act. "Vehicle" includes a ship, vessel or aircraft, (s. 9 (2)).

(h) *Andrew v. Faileworth Industrial, etc., Society*, [1904] 2 K. B. 32; 73 L. J. K. B. 511; *Warner v. Couchman*, [1912] A. C. 35; 81 L. J. K. B. 45; *Upton v. Great Central Ry.*, [1924] A. C., at p. 807; 93 L. J. K. B. 224.

incapable of work for a period not exceeding 156 days excluding Sundays (i), and no benefit is payable for the first three days unless he is incapacitated for at least twelve days (k). The rates vary according to the age of the insured person and to his domestic commitments (l).

**(b) Disablement Benefit.**

This may be either :—

(i) *a disablement pension*: if

(a) at the end of the period limited for the receipt of injury benefit, *i.e.*, 156 days, the beneficiary is suffering from loss of physical or mental faculty which is likely to be permanent or is substantial to the extent of at least 20 per cent.; or

(b) at some time after the benefit period he becomes subject to such a loss which is substantial or likely to become permanent, the insured person is entitled to a disablement pension (m). The degree of disablement must be assessed in multiples of ten; or

(ii) *a disablement gratuity*: if the disablement is assessed at less than 20 per cent., the insured person is entitled to a disablement gratuity of between £15 and £150 according to a scale prescribed by regulations (n).

The amount of disablement pension may be increased (o) as follows :—

(a) an *unemployability supplement* may be paid where as a result of the loss of faculty the beneficiary is incapable of work and likely to remain permanently incapable or prevented from earning more than £52 a year; or

(b) in cases of special hardship, *i.e.*, where, as a result of the loss of faculty, the beneficiary is incapable, and likely so to remain, of following his regular employment, a weekly increase may be made;

(i) S. 11 (4) of the 1946 Act.

(k) *Ibid.*, s. 11 (1).

(l) For example, the rate for an under 17 is 29s. 6d., for a person over 18, 45s. Where the beneficiary has a family, including a child, the rate is increased by 7s. 6d. (s. 17 (1) (a)).

(m) *Ibid.*, s. 12 (1).

(n) *Ibid.*, s. 12 (2).

(o) *Ibid.*, ss. 18 to 18.

- (c) *where constant attention is needed* and the disablement is 100 per cent. the weekly pension is increased;
- (d) *where the beneficiary enters hospital for approved treatment*, the weekly pension is increased;
- (e) *where a beneficiary is entitled to (a) and (d)*, the weekly sum is further increased if he has a family;
- (f) *where a beneficiary is receiving (a) or (d) and has dependents* the weekly sum is increased.

Provisions similar to these which increase the disablement pension may be made to increase the disablement gratuity (p).

(c) **Death Benefit (q).**

If an insured person dies as the result of an injury, industrial death benefit is payable to :—

- (i) *widows*—if at his death she was residing with him or was receiving or entitled (r) to receive from him periodical payments for her maintenance of not less than 5s. per week. This benefit is a weekly pension for life or until remarriage together with a gratuity;
- (ii) *widowers*—if at her death he was being wholly or mainly, *i.e.*, more than half, maintained by her and was permanently incapable of self-support. This benefit is a life pension;
- (iii) *children*—where at his death the deceased had a child or children, this benefit is increased;
- (iv) *parents*—if he or she was being maintained to a substantial extent, *i.e.*, an average of 5s. per week, by the deceased this benefit is a weekly pension for life or until remarriage if a mother;
- (v) *relatives*—if at the deceased's death certain prescribed relatives (s) were being wholly, mainly or substantially maintained by the deceased, death benefit is payable but only to one relative and "relative" does not include a husband, wife or parent;
- (vi) *a woman having the care of the deceased's children* at the time of his accident and death and residing with him and wholly or mainly maintained by the deceased is entitled to benefit.

The payment of these industrial benefits is made through the Post Office. The right to obtain them is extinguished if

(p) S. 14 (5).

(q) Ss. 19 to 24.

(r) *E.g.* under a court order, trust or agreement which she has taken steps to enforce.

(s) S. I. 1948 No. 1372, Schedule IV, rule 13.

payment is not obtained within three months, or six months if there is good cause. Absence from Great Britain and the undergoing of imprisonment or detention in legal custody are disqualifications from obtaining benefit (t).

#### 5. *The Industrial Injuries Fund.*

This is managed by the Minister and is for the receipt of contributions by employers, insured persons and the Exchequer and for payment out of benefits (u). Sums due to the Fund are recoverable as Crown debts and may be recovered summarily (a) as civil debts. Inspectors may institute and conduct proceedings (b). The limitation period for the recovery of the debt is three years from the time when the matter complained of arose (c).

#### Determination of Claims.

A claim to benefit under the National Insurance (Industrial Injuries) Act, 1946, is determined, subject to "special questions" (d), by the local Insurance Officer, subject to appeal to the local Appeal Tribunal, and, by leave, to the Insurance Commissioner. Decisions may be reviewed (e).

##### (a) *The Local Insurance Officer (f).*

A claim for benefit and all questions relating to claims or awards must be made to him in the form laid down in the Act (g). The claim must be in writing, on the proper form, together with a certificate of incapacity. The Insurance Officer must consider any claim, an employer must furnish any information and the insured person submit to a medical examination if necessary. If any "special questions" arise the Insurance Officer must refer these for decision and postpone his decision until they are determined. If no such question arises the Insurance Officer allows the claim wholly or in part if he is satisfied or, if he is not, decide against it or refer it to the local Appeal Tribunal. He

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(t) S. 32 (1).

(u) S. 58 (1).

(a) S. 70 (1).

(b) S. 70 (3).

(c) S. 70 (2).

(d) See *post*, p. 542.

(e) By an Officer or a Tribunal if satisfied by fresh evidence that there was ignorance of or mistake as to some material fact or if there is a relevant change of circumstances or a special question upon which the decision was based, has been revised. (S. 50).

(f) Ss. 44, 45, 48.

(g) S. 25 (1) and regulations made thereunder.



must give notice to the claimant of his decision and right of appeal.

(b) *The Local Appeal Tribunal (h).*

A claimant or beneficiary dissatisfied with the Insurance Officer's decision may appeal to the Tribunal.

(c) *The Insurance Commissioners (i).*

An appeal lies from a Tribunal at the instance of an Insurance Officer, a claimant or beneficiary or a person whose right as a widow, widower, child or parent for death benefit may be affected, or an association of employed persons of which the claimant or beneficiary was a member at the time of the accident. Leave is required of the Tribunal or the Commissioner but it must be given where a principle of importance is involved, or there are special circumstances.

An accident whereby a person suffers personal injury is deemed to be industrial if it arises out of and in the course of his employment. Where on a claim such question is determined, a *declaration of industrial accident* must be recorded, and this is conclusive, subject to appeal and review, for benefit in respect of that accident (k).

### Determination of Special Questions.

Certain questions called "special questions" (l), arising under the Act fall to be determined by the following persons and the Insurance Officer must refer them to such persons and postpone his decision pending their determination:—

(a) *the Minister of National Insurance* who determines the following "special questions"—

- (i) whether a person is or was employed in insurable employment;
- (ii) whether an employer or employed is exempt from contributions;
- (iii) who is liable for contributions as employer;
- (iv) the rate of contribution payable;
- (v) whether the increase for constant attendance is to be granted or renewed;
- (vi) the application of the limitations imposed by the Fourth Schedule to the Act (m) upon benefit payable in respect of death.

(h) S. 46.

(i) Ss. 42, 47.

(k) S. 49.

(l) S. 36 (1).

(m) See note (s), p. 540.

The Minister's decision on these questions is final save that he may refer any question of law arising in questions (i) to (iv) to the High Court and if he does not do so any person aggrieved may appeal to that Court (n);

(b) *the Minister and Referees* have to determine the following questions :—

(i) whether a person was a child or under the upper limit of compulsory school age;

(ii) whether a person had a family including a child.

(c) *Medical Boards and Medical Tribunals.*

Certain "special questions" are called "disablement questions", i.e.,

(i) whether the accident has resulted in a loss of faculty;

(ii) whether a loss of faculty is likely to be permanent;

(iii) at what degree the extent of the disablement resulting from a loss of faculty is to be assessed.

These questions are decided by a Medical Board, but a dissatisfied claimant may appeal to the Medical Tribunal.

The National Insurance (Industrial Injuries) Act, 1946, applies to the Crown as if it were a private employer (o).

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(n) S. 37 (1).

(o) S. 76.

## CHAPTER III

## CONTRACTS OF INDEMNITY AND SURETYSHIP.

## CONTRACTS OF INSURANCE

SECTION 1.—*Contracts of Indemnity and Suretyship*

A CONTRACT of indemnity is a contract, express or implied, "to keep a person who has entered or is about to enter into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not" (a). A guarantee, on the other hand, is a promise to be answerable for the debt, default, or miscarriage of another person who is primarily liable. Instances of guarantees are promises to pay a creditor if the principal debtor makes default in payment and contracts of suretyship for a servant or agent.

Instances of express contracts of indemnity are policies of fire and marine insurance. An instance of an implied contract of indemnity is the implied contract by a principal to indemnify his agent against all losses and liabilities properly incurred by him in the execution of his agency (b). Whilst a contract to indemnify a person against his common law or statutory liability is good (c), yet the punishment inflicted upon a person by a Criminal Court is personal to the offender and it is against public policy for the Courts to entertain an action by an offender to recover an indemnity against the consequences of the punishment (d).

An important difference between a contract of indemnity and a contract of guarantee is that the latter is within s. 4 of the *Statute of Frauds* (e). An agreement to give a guarantee is also within the statute (f).

To constitute a guarantee there must be:—

- i. A principal contract between A and B, by which B is already, or is to become, liable to A; and

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(a) *Guild v. Conrad*, [1894] 2 Q. B., at p. 896; 68 L. J. Q. B. 721.

(b) *Ante*, p. 466.

(c) *Whitby v. Burt, Boulton and Hayward*, [1947] K. B. 918; *Hosking v. De Havilland Aircraft Co.*, [1949] 1 All E. R. 540.

(d) *Askey v. Golden Wine Co.*, [1948] 2 All E. R. 85.

(e) *Ante*, p. 54.

(f) *Mallett v. Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

- ii. A collateral contract between A and C, by which C promises A to pay the debt or discharge the obligation due from B in case of default by B, *who is to remain primarily liable* (g).

Thus, if C goes into a shop with B, and says to the shopkeeper A, "Supply goods to B, and, if he does not pay you, I will", this is a guarantee, because C's promise is made to a person to whom B is or will be under a legal liability; and it is collateral to the contract between A and B, and conditional upon B's failure to pay. But if C goes into a shop with B, and says to the shopkeeper, "Supply goods to B, and I will see you paid", this is a promise by C to indemnify the shopkeeper against the consequences of his contracting with B, and is not within the statute (h).

Thus, in *Stanley & Co. v. J. C. Solomon, Ltd.* (i), the defendants wrote to the plaintiffs as follows: "Dear Sirs,—In consideration of your paying to J. C. S., Ltd., 50 per cent. of any commission received on business introduced by them as agents, it is hereby agreed that the company shall be liable to you for 50 per cent. of any loss sustained by you in connection with such business. (Signed) J. B., secretary; J. C. S., director." *Held*, that this was a contract of indemnity.

It must be noted that "the Statute [of Frauds] applies only to promises made to the person to whom another is answerable", i.e., only when the promise is made to the principal creditor, not when it is made to the debtor (k). The statute further applies only when there is an "absence of any liability on the part of the defendant or his property, except such as arises from his express promise" (l). It does not therefore apply when the promise is merely part of, and incidental to, a main or larger contract made for some other purpose (m).

Thus a promise to pay the debt of another person is not within the Statute of Frauds when it is made by a person who has purchased or has an interest in goods which are subject to a lien or charge, and who obtains a discharge of the lien or

(g) *Goodman v. Chase*, 1 B. & Ald. 297; see also *Harburg India-rubber Co. v. Martin*, [1902] 1 K. B., at p. 784; 71 L. J. K. B. 529; *Davys v. Buswell*, [1913] 2 K. B., at p. 54; 82 L. J. K. B. 499.

(h) *Birkmyr v. Darnell*, 2 I.d. Raym. 1085; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17; 43 L. J. Q. B. 188.

(i) [1932] 2 K. B. 287; 101 L. J. K. B. 532.

(k) *Eastwood v. Kenyon*, 1 Ad. & E., at p. 466; 9 L. J. Q. B. 409, 32 R. E. 400.

(l) See *Davys v. Buswell*, [1913] 2 K. B., at p. 55; 82 L. J. K. B. 499.

(m) *Harburg India-rubber Co. v. Martin*, [1902] 1 K. B., at p. 786.

charge by undertaking to be responsible for payment of the debt in respect of which it existed (n).

But the mere fact that the *motive* of a person who guarantees payment of a debt due from a company is his desire to protect an interest which he has in the company through being a shareholder (o), or through having a floating charge on its assets (p), will not take the case out of s. 4 of the Statute of Frauds.

Nor is such a promise within the Statute of Frauds when it is one of the terms of a contract of service, and merely regulates the conditions under which the defendant is employed. Thus the statute does not apply to a contract by a *del credere* agent, i.e., an agent who guarantees his principal against any loss through the bankruptcy or insolvency of the parties with whom he contracts (q).

Another instance of this principle is afforded by the case of *Sutton & Co. v. Gray*, in which there was a contract between a firm of brokers and the defendant, of which the terms were that he should introduce to them clients for whom they should transact business on the Stock Exchange, and that he should have half the commission earned upon, and be responsible for half the losses incurred in, such transactions. It was held that, since the main object of the agreement was to regulate the terms of the employment, the Statute of Frauds did not apply to it, although as one of its results the defendant might have to answer for the debt of another (r).

It has already been pointed out that, by the *Mercantile Law Amendment Act*, 1856, the consideration for a guarantee need not be expressed in writing (s), though, of course, as in all other contracts, there must be some consideration unless the guarantee is under seal. And since loans to an infant are void under the *Infants' Relief Act*, 1874, a loan by a bank to an infant, where the fact that he is an infant is known to all parties, is insufficient consideration to support the promise by a guarantor to guarantee such loan and the guarantor is not liable upon his promise (t).

(n) *Davys v. Buswell*, [1913] 2 K. B., at p. 59. For an example see *Fitzgerald v. Dressler*, 7 C. B. (N.S.) 374; 29 L. J. C. P. 118; 121 R. R. 543.

(o) *Harburg, etc., Co. v. Martin* (*ubi supra*).

(p) *Davys v. Buswell* (*ubi supra*).

(q) *Couturier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97. See also, *ante*, p. 489.

(r) [1894] 1 Q. B. 285; 63 L. J. Q. B. 633. See also *Guild v. Conrad*, [1894] 2 Q. B. 885; 63 L. J. Q. B. 721.

(s) Vol. 1, p. 61.

(t) *Coutts & Co. v. Browne-Lecky*, [1917] K. B. 104; 115 L. J. K. B. 508.

The words "surety" and "guarantor" are not, however, limited to cases where a personal liability has been assumed. Thus, if A, without incurring any liability, deposits with B's bank securities and a memorandum of deposit to secure B's overdraft, A is a surety or guarantor (*u*).

**Rights of surety.**—*As against his principal* the surety has a right to be indemnified not only against actual loss, but also, even before any payment by him, against any liability which has actually arisen (*a*). After payment the surety becomes a creditor of his principal for the amount paid on his behalf (*b*).

*As against the creditor* the surety is entitled to claim the right of *subrogation*—that is, "the right to be put in the place of the creditor as against the principal debtor, and to use all the remedies which the creditor could have used as against the principal debtor" (*c*). By s. 5 of the *Mercantile Law Amendment Act*, 1856, a surety is entitled to have assigned to him or to a trustee for him every judgment or other security held by the creditor, notwithstanding that it may be deemed at law satisfied by his payment or performance, and is entitled to stand in the place of the creditor and to use all the remedies open to the creditor in order to obtain indemnity from the principal debtor *or from any co-surety*. This section applies to all securities received by the creditor before or after the date of the guarantee, even though the surety was unaware of their existence (*d*).

*As against his co-sureties* the surety has the right to *contribution*; that is to say, if any of several co-sureties is called upon to pay the debt or any part of it, he has a right to call upon his *solvent* co-sureties to contribute equally if each is a surety to an equal amount, and, if not equally, then proportionately to

(*u*) *Re Conley, Trustees v. Barclays Bank* (1938), 107 L. J. Ch. 257, C. A.

(*a*) *Lacey v. Hill*, 18 Eq. 182; 43 L. J. Ch. 551; *Hobbs v. Wayet*, 86 Ch. D., at p. 258; 56 L. J. Ch. 819. *Secus* when the liability may never come into existence; *Hughes-Hallett v. Indian, etc., Co.*, 22 Ch. D. 561; 52 L. J. Ch. 418.

(*b*) *Davies v. Humphreys*, 6 M. & W., at p. 157; 9 L. J. Ex. 263. The obligation of the principal debtor to repay is based upon an implied contract arising at the date of the guarantee; *Re A Debtor*, [1937] Ch. 156; 106 L. J. Ch. 172.

(*c*) *Darrell v. Tibbitts*, 5 Q. B. D., at p. 563; 50 L. J. Q. B. 33.

(*d*) *Forbes v. Jackson*, 19 Ch. D. 615; 51 L. J. Ch. 690; *Ward v. Nat. Bank of New Zealand*, 8 A. C., at p. 765; 52 L. J. P. C. 65; and see *Duncan, Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1; 50 L. J. Ch. 335.

the amount for which each is a surety (e). To give a co-surety this right to contribution, it is not necessary that he should have actually paid more than his share; it is sufficient if a judgment for more than his share has been obtained against him (f).

Where a surety is suing his co-sureties for contribution he must also make the principal debtor a defendant to the action unless there is some very good reason for not doing so as, e.g., because he is insolvent (g).

**Rescission of contract.**—A contract of suretyship may, like any other contract, be *voidable* on the ground of misrepresentation (h), and also in some cases on the ground of non-disclosure. Contracts of suretyship are not ordinarily *uberrimæ fidei* in the sense that there is an obligation to make full disclosure of all material facts (i). But “very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid” (k). And concealment of a fact which a surety would expect not to exist, and the existence of which is inconsistent with the presumed basis of the contract, may amount to an implied representation that the fact does not exist (l). Thus, where a person becomes surety for the honesty of a servant he is entitled to assume that the servant has not, to the knowledge of the master, been guilty of any previous dishonesty, and the failure of the master to disclose any dishonesty known to him will render voidable the contract of suretyship (m). But where a guarantee is given to a bank for an overdraft by a customer the guarantor is not entitled to assume that the customer is not already overdrawn, because it is probably for that very reason that a guarantee is required; the failure by the bank to disclose the state of the customer’s account will not therefore render voidable the contract of suretyship (n). Nor in such a case is

(e) *Dering v. Earl of Winchelsea*, 2 W. & T. 589; 1 R. R. 41; see *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 62 L. J. Ch. 773; and *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173 (where the doctrine of contribution and its application are explained and the authorities are reviewed).

(f) *Wolmershausen v. Gullick* (*ubi supra*).

(g) *Hay v. Carter*, [1885] 1 Ch. 397; 104 L. J. Ch. 220.

(h) *Ante*, p. 102.

(i) *Lee v. Jones*, 17 C. B. (N.S.) 482; 34 L. J. C. P. 181; 142 R. R. 467; *Davies v. London, etc., Marine Insurance Co.*, 8 Ch. D., at p. 475; 47 L. J. Ch. 511.

(k) *Davies v. London, etc., Marine Insurance Co.* (*ubi supra*).

(l) *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72; 81 L. J. K. B. 608.

(m) *Id.*, and see *Railton v. Matthews*, 10 Cl. & Fin. 984; 59 R. R. 308.

(n) *London General Omnibus Co. v. Holloway* (*ubi supra*); *Hamilton v. Watson*, 12 Cl. & Fin. 109.

the bank bound to disclose to the guarantor facts from which it has suspicions that the customer is defrauding the guarantor (o). Nor is the bank bound to disclose to a guarantor of a customer's bank account the fact that the customer's husband has authority to draw upon his wife's account, that the husband is an undischarged bankrupt or that the account is being operated in an irregular way in that certain cheques had been drawn and then orders given to the bank not to pay (p).

**Discharge of surety.**—The terms employed in a contract, defining a surety's undertaking and expressing the terms on which he is to be freed from his undertaking, ought to be strictly construed. In case of doubt the Court will lean in his favour. Neither equity nor law will put a construction on a document which results in imposing on the surety any more than, on the strictest construction of the instrument, he must be said expressly to have undertaken, or so as to detract from the right given to the surety by the proviso defining the circumstances in which the surety is to be held discharged. It is settled law that a surety's contract is one *strictissimi juris* and that the Courts treat a surety as a favoured debtor (q).

A surety may be *discharged*:—

1. By express agreement between himself and the creditor (r).
2. By the extinction of the principal contract, as, *e.g.*, by the release of the principal debtor (s). But by the *Bankruptcy Act*, 1914, an order of discharge in bankruptcy does not release a surety for the bankrupt (t), nor does the acceptance by a creditor of a composition or scheme of arrangement release a surety for the debtor (u).

But a surety is not discharged if the creditor merely covenants not to sue the principal debtor, but expressly reserves his

(o) *National Provincial Bank v. Glanusk*, [1913] 3 K. B. 385; 89 L. J. K. B. 1083.

(p) *Cooper v. National Provincial Bank, Ltd.*, [1945] 2 All E. R. 641 (applying *Hamilton v. Watson*, *supra*).

(q) *Eastern Counties Building Society v. Russell*, [1947] 2 All E. R. 734, C. A.

(r) See *ante*, p. 208.

(s) *Commercial Bank of Tasmania v. Jones*, [1898] A. C. 813; 62 L. J. P. C. 104.

(t) S. 28 (4).

(u) S. 16 (20). A payment made by the debtor to the creditor, which is afterwards set aside as a fraudulent preference in the debtor's bankruptcy, does not discharge the surety: *Petty v. Cooke*, L. R. 6 Q. B. 790; 40 L. J. Q. B. 281.



rights against the surety (a); and the discharge of the surety may also be prevented by an express provision in the contract of suretyship that the surety shall continue liable notwithstanding the release of the principal debtor (b).

8. By any transaction which varies the position or liability of the surety *without his consent* (c), as, e.g.:—

- i. When co-sureties agree to become sureties jointly and severally, and one of them fails to execute the agreement of suretyship or is released by the principal creditor (d); but a surety who contracts only severally is not released by the release of a co-surety, or his failure to execute the agreement (e).
- ii. When the creditor fails to perform a condition in consideration of which the surety entered into the contract of suretyship (f).
- iii. By alteration of the instrument of suretyship by a co-surety who is jointly and severally liable (g).
- iv. By any alteration in the terms of the contract between the creditor and the principal debtor, unless such alteration is clearly unsubstantial or one which cannot be prejudicial to the surety (h). But if the creditor enters into a contract with the principal debtor to give him time, this is an alteration which is always material, because it deprives the surety of the right which he has to pay off at once the debt which he has guaranteed and to have the securities of the creditor and to sue the principal debtor. Such an agreement, therefore, always discharges the surety, unless the creditor in making it

(a) *Price v. Barker*, 4 E. & B. 760; 24 L. J. Q. B. 180.

(b) *Perry v. National Provincial Bank of England*, [1910] 1 Ch. 464; 79 L. J. Ch. 509. Where under a provision of the contract of suretyship the creditor compounds with the debtor, reserving his rights against the surety, the latter remains liable for the whole debt, but can recover the whole amount from the debtor: *id.*, and see *Kearsley v. Cole*, 16 M. & W. 128; 16 L. J. Ex. 115; *Cole v. Lynn*, [1942] 1 K. B. 143; 111 L. J. K. B. 168, C. A.

(c) See *Newton v. Chorlton*, 2 Drew., at p. 339; 90 R. R. 501; *Rees v. Berrington*, 6 Ves. Jun. 540; 3 R. R. 3; *Polak v. Everett*, 1 Q. B. D. 669; 46 L. J. Q. B. 218.

(d) *Bonser v. Cox*, 6 Beav. 110; *Evans v. Bembridge*, 25 L. J. Ch. 384; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; 65 L. J. Ch. 173.

(e) *Ward v. Nat. Bank of New Zealand*, 8 App. Cas. 755; 52 L. J. P. C. 65.

(f) *Laurenco v. Walmsley*, 31 L. J. C. P. 143; *Greer v. Kettle*, [1938] A. C. 156.

(g) *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; 65 L. J. Ch. 173.

(h) *Holme v. Brunskill*, 3 Q. B. D. 495; 47 L. J. Q. B. 610; see also *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46; 46 L. J. C. P. 76; *Egbert v. National, etc., Bank*, [1918] A. C. 903; 87 L. J. P. C. 188.

expressly reserves his rights against the surety (i). But a mere forbearance to sue the principal debtor will not discharge the surety (k); there must be a binding contract, capable of being enforced; and it must be made with the principal debtor, and not with a third party (l).

Where there are several distinct and separate contracts, a contract to give time to the principal debtor in respect of one will not discharge the surety, but where there is only one contract under which payment has to be made by fixed instalments, as, e.g., in the case of a hire-purchase agreement, a binding contract to give time to the debtor in respect of one instalment, made without the consent of the surety, operates as a discharge of the whole contract of suretyship (m).

- v. By the *connivance* of the creditor in any act contrary to the conditions of the guarantee which is likely to lead to default on the part of the principal debtor, though not by mere carelessness of the creditor (n).
- vi. By any act or omission on the part of the creditor which is injurious to the surety or inconsistent with his rights (o), as, for example, if a servant whose honesty is guaranteed is retained in his employment after acts of dishonesty justifying dismissal (p), or if the creditor gives up or impairs a security upon the benefit of which a surety is entitled to rely (q).

**Revocation of a continuing guarantee.**—A continuing guarantee which is given for a consideration provided from time to time, and divisible, e.g., for the balance of a running account at a bank or for goods to be supplied, may always be revoked as to future transactions or debts so as to discharge the surety from

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(i) *Id.*; and see *Owen v. Homan*, 4 H. L. 997; 30 L. J. Ch. 314; *Strong v. Foster*, 25 L. J. C. P. 106; *Boaler v. Mayor*, 19 C. B. (n.s.) 76; 34 L. J. C. P. 280; *Goldfarb v. Bartlett & Kremer*, [1920] 1 K. B. 639; 89 L. J. K. B. 258.

(k) *Strong v. Foster* (*ubi supra*); and see *Rouse v. Bradford Banking Co.*, [1894] A. C. 586; 63 L. J. Ch. 890.

(l) *Clarke v. Birley*, 41 Ch. D. 422; 58 L. J. Ch. 616.

(m) *Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256; 98 L. J. K. B. 490.

(n) *Mayor, etc., of Durham v. Fowler*, 22 Q. B. D., at p. 420; 58 L. J. Q. B. 246.

(o) *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 229. Affirmed, 7 H. & N. 353.

(p) *Phillips v. Fowall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(q) *Campbell v. Rothwell*, 47 L. J. Q. B. 114; and see *Taylor v. Bank of New South Wales*, 11 App. Cas., at p. 608; 55 L. J. P. C. 47; *Re Darwin and Pearce*, [1927] 1 Ch. 176; 95 L. J. Ch. 487; *Smith v. Wood*, [1929] 1 Ch. 14; 98 L. J. Ch. 59.

further liability (r). Such a guarantee is not revoked simply by the death of the guarantor, but notice of the death of the guarantor given to the creditor is constructive revocation as to future advances (s), unless the contract stipulates that some particular notice of revocation shall be necessary in order to terminate the guarantee (t).

But a continuing guarantee, when the consideration is given once for all, *e.g.*, for admission at Lloyd's, or for granting a lease, or for the honesty of a servant, cannot be revoked unless there is an express stipulation to that effect; nor is it determined by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guarantee is given (u).

By s. 18 of the *Partnership Act*, 1890, a continuing guarantee, given either to a firm or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, it was given.

## SECTION 2.—*Contracts of Insurance* (a)

*The contract of insurance.*—Insurance is a contract by which, in consideration of a sum of money called the premium, the insurer contracts with the assured either to pay him a specified sum on the happening of a particular event, such as the death of a particular person or injury by accident, or to indemnify him, usually up to a specified amount, against a loss caused by some particular risk such as fire, burglary or marine adventure.

To protect policy holders to some extent against the possible failure of the insurers, by the *Assurance Companies Act*, 1909, all

(r) *Offord v. Davies*, 12 C. B. (N.S.) 748; 31 L. J. C. P. 319; 133 R. R. 491; *Re Grace, Balfour v. Grace*, [1902] 1 Ch. 738; 71 L. J. Ch. 358. Whether or not a guarantee is a continuing one is a question of construction. See *Allnutt v. Ashenden*, 5 M. & G. 392; 12 L. J. C. P. 124; *Ellis v. Emanuel*, 1 Ex. D. 157; 46 L. J. Ex. 25; *Hesfield v. Meadows*, L. R. 4 C. P. 596; *Coles v. Paek*, L. R. 5 C. P. 65; 39 L. J. C. P. 63.

(s) *Coulthart v. Clementson*, 5 Q. B. D. 42; 49 L. J. Q. B. 204.

(t) *Re Silvester, Midland Ry. v. Silvester*, [1895] 1 Ch. 578; 64 L. J. Ch. 390. In this case the contract provided that the sureties or their representatives might terminate their liability by a month's notice in writing:—*Held*, that a mere notice of the death of a surety by his executor was insufficient.

(u) *Re Grace, Balfour v. Grace*, [1902] 1 Ch. 738; 71 L. J. Ch. 358; *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140.

(a) It is quite outside the scope of this work to deal with the provisions of compulsory social insurance under the National Insurance Act, 1946 and with industrial insurance under the National Insurance (Industrial Injuries) Act, 1946. As to the latter see *ante*, p. 533.

persons (save trade unions) whether incorporated or not, who carry on within the United Kingdom life, fire, accident, bond investment, motor vehicle, aircraft or industrial insurance business, must deposit with the Paymaster-General the sum of £20,000. If the insurer carries on more than one class of insurance a separate deposit of £20,000 must be made in respect of each class in which the insurer deals. By s. 1 of the *Assurance Companies Act*, 1916, no person in future is to commence insurance business of the types within the 1909 Act except an incorporated company having a minimum paid-up share capital of £50,000. Hence new concerns with insufficient financial resources may not undertake insurance business.

All contracts of insurance are contracts *uberrimæ fidei*, and may therefore be avoided not only on the ground of fraudulent or material misrepresentation (b), but also if the assured conceals or fails to disclose any fact within his knowledge which it is material for the insurer to know (c).

It may also be made an express term of the contract that the truth of some particular statement, or the existence of some particular thing, or performance of some particular act, shall be the basis of the contract, so that no question of its materiality can arise, and in case of its untruth or non-existence or non-performance the contract will be absolutely null and void (d). And, in contracts of insurance, such a term may take the form either of a warranty or a condition.

Thus, in most contracts of insurance, other than those of marine insurance, the person to be assured fills up and signs a proposal form which contains a provision that the truth of his answers to certain questions thereon shall be the basis of the contract, and that any suppression, concealment, or untrue statement shall avoid the contract (e).

(b) See *ante*, p. 108.

(c) *Lindenau v. Desborough*, 8 B. & C. 586; 7 L. J. K. B. 42; *London Assurance v. Mansel*, 11 Ch. D., at p. 367; 48 L. J. Ch. 381; *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.*, [1925] A. C. 344; 94 L. J. P. C. 60. As to marine insurance, see also the *Marine Insurance Act*, 1906, s. 18.

(d) See *Thomson v. Weems*, 9 App. Cas. 671; *Hambrrough v. Mutual Life Insurance Co. of New York*, 72 L. T. 140; *Ellinger v. Mutual, etc., of New York* (see *post*, p. 574); *Yorke v. Yorkshire Insurance Co.*, [1918] 1 K. B. 662; 87 L. J. K. B. 881; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; 91 L. J. P. C. 210; *Glicksman v. Lancashire, etc., Assurance Co.*, [1927] A. C., at p. 148.

(e) *Glicksman v. Lancashire, etc., Assurance Co.* (*ubi supra*); *Newsholme Bros. v. Road Transport, etc., Insurance Co.*, [1929] 2 K. B., at p. 362; 98 L. J. K. B. 751.

Insurance policies also as a rule contain provisions, usually termed conditions, as to the doing of some act by the insured, as, *e.g.*, that he shall give notice of an accident within a certain time. The failure to perform such a "condition" does not, however, prevent the insured from recovering, unless it is a condition of the contract or its performance is expressly made a condition precedent to his right to recover (f).

It is open to insurers to make any bargain as to what constitutes the basis of the contract or a condition precedent to the right of the insured to recover : but they must do so in clear words.

Thus, in *Provincial Insurance Co. v. Morgan* (g), the respondents, who were coal merchants, wished to insure a motor lorry. The proposal form required them to state (a) the purposes (in full) for which it would be used, and (b) the nature of the goods to be carried. The answers were (a) "delivery of coal" and (b) "coal". The proposal form also contained a declaration, which was signed by the respondents, in the following terms: "I hereby declare and warrant that the above questions are fully and truthfully answered. . . . I agree that this declaration and the answers given above shall be the basis of the contract between me and the company". The policy contained a recital incorporating the proposal and declaration "which it is agreed shall be of a promissory nature and effect and shall be the basis of the contract". The policy also contained the following condition: "It is a condition precedent to any liability on the part of the company under this policy (i) that the terms, conditions and indorsements hereof so far as they relate to anything to be done or complied with by the insured are duly and faithfully observed; and (ii) that the statements made and answers given in the proposal hereinbefore referred to are true, correct and complete". One of the indorsements, under the head "Indorsements and Use Clauses", was "Transportation of own goods in connection with the insured's business", *i.e.*, the business of coal merchants.

An accident occurred while the lorry was carrying coal, but on the same day it had, under a contract with the Forestry Commissioners, hauled three loads of timber, and for this reason the company claimed that the policy was avoided.

*Held*, (i) that even if the respondents' answers were of a promissory nature and created a warranty of condition, there was no breach of that warranty or condition unless it imported that during the currency of the policy the lorry was to be used *exclusively* for the delivery of coal and for no other purpose; (ii) that this was not the true construction of the question and answers and therefore no condition was broken; (iii) that the

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(f) *Stoneham v. Ocean, etc., Accident Insurance Co.*, 19 Q. B. D. 237; *Welch v. Royal Exchange Assurance*, [1939] 1 K. B. 294; 108 L. J. K. B. 83; *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E. R. 243.

(g) [1933] A C 240. 109 T. J. K. B. 124

answers were "true, correct and complete" because the words "in full" on the question were not sufficiently clear to carry the meaning of exclusive user, and that the same applied to the indorsement.

Even where there is a breach of a warranty or condition the acceptance by the insurer of premiums with knowledge of the breach may amount to a waiver thereof (h).

Thus, in *Ayrey v. British, etc., Assurance Co.* (i), the assured signed a proposal form for an insurance on his life by the defendant company. His occupation was therein stated as that of a fisherman, which was correct. But he was also a member of the Royal Naval Reserve and was expecting to be called up in order to be employed in mine-sweeping. This fact was communicated to the agent of the company who received the proposal form and also to the district manager, who nevertheless continued to receive the premiums. Held, (i) that the district manager's knowledge was the knowledge of the company since it was his duty to supervise the company's agents and to be the means of communication between them and the head office; (ii) that the acceptance of the premiums was a waiver by the company of any breach of condition through the concealment of a material fact.

From a statement which is the basis of the contract there must, however, be distinguished a statement which merely defines or describes the risk covered by the policy.

Thus, in *Farr v. Motor Traders, etc., Society* (k), the plaintiff was the owner of a taxicab which he desired to insure. In the proposal form there was a question asking whether it was driven in one or more shifts per twenty-four hours. The plaintiff answered "Just one". The cab was for a day or two driven in more than one shift during twenty-four hours, but subsequently an accident happened while it was only being driven in one shift during twenty-four hours. Held, that the answer did not amount to a warranty but to a statement descriptive of the risk. The policy did not therefore come to an end when the cab was driven in two shifts during the twenty-four hours, but merely ceased to attach until it was again being driven in one shift (l).

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(h) *Ayrey v. British Legal and United Provident Assurance Co.*, [1918] 1 K. B. 136; 87 L. J. K. B. 518. See also *Wing v. Harvey*, 5 De G. M. & G. 265.

(i) *Ubi supra*,

(k) [1920] 3 K. B. 669; 90 L. J. K. B. 215.

(l) In the case of *Provincial Insurance Co. v. Morgan*, ante, p. 554, it was held by the Court of Appeal, [1932] 2 K. B. 70, that the questions and answers in the proposal form only amounted to a description or definition of the risk and that, as the accident occurred while the lorry was carrying coal, the policy covered it. The House of Lords, though coming to its decision on different grounds, did not dissent from this view.

Where a proposal form is incorrectly filled up for a proposed assured by a mere *agent* of the company with which insurance is intended to be effected, the agent's knowledge of its inaccuracy cannot ordinarily be imputed to the company; for, in the first place, the agent has no implied authority to do more than procure proposals, and in filling up the form is *prima facie* acting as agent of the assured, not as agent for the insurer, and in the second place, the fact that the agent, if he knows that the form is filled up inaccurately, is acting in fraud of the insurer, would prevent his knowledge from being imputed to the insurer (m); moreover, if the assured signs a contract in writing containing a provision that the statements contained therein are to be the basis of the contract, he cannot vary it by oral evidence of anything said during the negotiations (n).

An exceptional case in which knowledge of an agent was imputed to the insurer is that of *Bawden v. London, etc., Assurance Co.* (o). In this case Bawden was an illiterate man with only one eye. The proposal form, which was filled up by the agent of the insurance company, contained a declaration, the material words of which were: "I have no physical infirmity"; against this clause there was a marginal note: "If not strictly applicable, particulars of any deviation must be given at the back". No particulars as to the one-eyed condition of Bawden were given by the agent, although he was aware of it. It was held that the agent's knowledge was the knowledge of the company, who must therefore be taken to have contracted with a man who, to their knowledge, was a one-eyed man. If this decision is still good law it can be supported only on the grounds that since the agent had authority to see the proposer and get a proposal form from him, the company was fixed with notice of what the agent saw at the interview (p).

Any material representation made by the assured must be true, not merely when it is made, but when the *contract* is concluded. Thus A, in his proposal, made certain statements as to his

(m) See *ante*, p. 479.

(n) *Newsholme Bros. v. Road Transport, etc., Co.*, [1929] 2 K. B. 356; 98 L. J. K. B. 751, reviewing the previous authorities; see also *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516; 71 L. J. K. B. 79 (where this principle was applied although the assured did not know that the agent filled up incorrect answers), and *Levy v. Scottish, etc., Insurance Co.*, 17 T. L. R. 229.

(o) [1892] 2 Q. B. 534; 61 L. J. Q. B. 792.

(p) See *Newsholme Bros. v. Road Transport, etc., Co.*, [1929] 2 K. B., at p. 381, where it is also pointed out that in *Bawden's Case* oral evidence of what happened at the interview between Bawden and the agent was admissible, not to vary, but to construe the contract. Note also that in *Ayrey's Case*, *ante*, p. 555, which is also explained in the *Newsholme Case*, the knowledge imputed to the company was not that of an agent but of a local manager. See also *ante*, p. 478.

health, and a declaration that they were true and were to be taken as the basis of the contract. The proposal said nothing about the premium. The insurers wrote accepting his offer, *subject to payment of a certain premium*, their letter thus being not a binding acceptance, but a mere offer. A, having subsequently to his proposal suffered an accident which materially altered the state of his health, tendered to the company the premium, which they refused. It was held (i) that there was no contract before the tender of the premium, and (ii) that since the risk was changed the insurers' offer could not be regarded as a continuing offer which A was entitled to accept (q). So also the renewal of a policy is impliedly made on the basis that the statements in the original proposal are still true (r).

All ordinary contracts of insurance (except life insurance and insurance against personal injury) and of re-insurance are contracts of *indemnity*, which means "that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified, and anything which diminishes that loss diminishes the amount which the insurer is liable to pay" (s).

*Insurable interest*.—It is essential to every contract of insurance that it should not be a mere contract of gaming or wagering, and that the assured should have an *insurable interest* in the subject-matter of the contract.

This, as regards marine insurance, is enacted by s. 4 of the *Marine Insurance Act*, 1906, and, as regards all other contracts of insurance, by the *Life Assurance Act*, 1774, which (i) prohibits and makes void the making of any insurance on the life of any person or on any event whatsoever wherein the person for whose benefit or on whose account the policy is made has no interest; or by way of gaming and wagering; and (ii) provides that it shall not be lawful to make any policy without inserting therein the name of the person interested therein or for whose benefit or on whose account it is made; and (iii) provides also that no greater

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(q) *Canning v. Farquhar*, 16 Q. B. D. 727; 55 L. J. Q. B. 225. See also *Looker v. Law Union, etc., Insurance Co.*, [1928] 1 K. B. 554; 97 L. J. K. B. 328.

(r) *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28; 89 L. J. Ch. 329.

(s) *Castellain v. Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366; *British Dominions Insurance Co., Ltd. v. Duder*, [1915] 2 K. B. 394; 84 L. J. K. B. 1625; *Meacock v. Bryant & Co.*, 167 L. T. 371.



sum shall be recovered from the insurer than the amount or value of the interest of the assured at the date of the policy (t).

This Act does not, however, apply to insurances on ships, goods and merchandise (u). Nor does it apply to policies within s. 86 (4) of the *Road Traffic Act*, 1980, (a).

Premiums paid under a mere wager policy cannot be recovered (b).

Generally speaking, a person has an insurable interest whenever he has some legal or equitable relation to or concern or interest in the subject of the insurance, which relation, concern or interest may, by the happening of the risk insured against, be so affected as to produce a damage, detriment or prejudice to the person insuring (c). It is not necessary, however, that a person insuring property should have a right arising out of ownership (d), it is sufficient if he is legally responsible to some other person in respect of the property insured (e). Accordingly a bailee who is responsible to his bailor for goods entrusted to him has an insurable interest in such goods to their full value and can recover the full value from the insurer, but, after satisfying his own claim, he is trustee of the balance for the bailor (f).

It is not necessary that a contract of insurance should be in writing, but a contract of marine insurance is inadmissible in evidence unless embodied in a stamped marine policy, and in the case of other contracts of insurance a stamped policy must be issued within a month after the receipt of the premium (g).

*Rights of an insurer on payment.*—Where a contract of insurance is a contract of indemnity, the insurer on payment has the rights of subrogation and contribution.

(t) *Id.*, ss. 1, 2, 3. With certain exceptions in the case of life insurance, the interest must, therefore, be a pecuniary interest: see *Griffiths v. Fleming*, [1909] 1 K. B., at p. 814; 78 L. J. K. B. 567.

(u) S. 4. See also *Williams v. Baltic Insurance Association*, [1924] 2 K. B. 282; 93 L. J. K. B. 819.

(a) *Tattersall v. Drysdale*, [1935] 2 K. B. 174. See *post*, p. 577.

(b) *Howard v. Refuge Friendly Society*, 54 L. T. 644; *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558; 73 L. J. K. B. 378.

(c) *Lucena v. Crawford*, 2 Bos. & P. N. R. 269; 6 R. R. 623; *Moran, Galloway & Co. v. Uzielli*, [1905] 2 K. B., at p. 562; 74 L. J. K. B. 494; *Macaura v. Northern Insurance Co.*, [1925] A. C. 619; 94 L. J. P. C. 154.

(d) *Moran, Galloway & Co. v. Uzielli* (*ubi supra*).

(e) *Marks v. Hamilton*, 7 Ex. 923; 21 L. J. Ex. 169; 86 R. R. 667; *Stock v. Inglis*, 12 Q. B. D. 564; affirmed *sub nom. Inglis v. Stock*, 10 App. Cas. 263; 54 L. J. Q. B. 582.

(f) *Waters v. Monarch Life Assurance Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102; *L. & N. W. Ry. v. Glyn*, 1 E. & E. 652; 28 L. J. Q. B. 188.

(g) Stamp Act, 1891, ss 98—100.

The right of *subrogation* is the right of insurers who have paid to the assured the amount of his loss, to be put in the place of the assured and to have "the advantage of every right of the insured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been diminished" (h).

The right of *contribution* exists where more than one policy has been effected in respect of the same interest in the same property. In such a case, in the absence of any contrary provision in either policy, the assured can recover the full amount from any of the insurers. Each insurer then has the right to recover a rateable proportion from the other insurers (i).

An insurance may be effected against almost any loss or contingency, but the most important kinds are marine, fire, life and accident insurance.

#### SUB-SECTION 1.—*Marine Insurance*

The law on this subject is now governed by the *Marine Insurance Act, 1906* (k). The discussion of this Act is outside the scope of this book but a few of the most important sections may be noted.

**The contract.**—A contract of marine insurance is one whereby the insurer, usually called the underwriter, undertakes to *indemnify* the assured against losses incident to marine adventure (l).

There is a marine adventure when (i) any ship, goods, or other moveables are exposed to maritime perils, or (ii) the earning or acquisition of any freight, passage money, profit or other pecuniary benefit is endangered by the exposure of insurable property to maritime perils, or (iii) any liability to a third party

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(h) *Castellain v. Preston*, 11 Q. B. D. 727; 55 L. J. Q. B. 225; *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226; 66 L. J. Q. B. 36.

(i) See *North British, etc., Insurance Co. v. London, Liverpool and Globe Insurance Co.*, 5 Ch. D. 569; 46 L. J. Ch. 537.

(k) The First Schedule to the Act contains a form of policy and rules for its construction.

(l) S. 1.

may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils, that is to say, perils consequent on, or incidental to, the navigation of the sea (*m*).

Every contract of marine insurance by way of gaming and wagering is void : it is deemed to be a gaming or wagering contract where the assured has not an insurable interest and the contract is entered into with no expectation of acquiring such an interest, or where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or subject to any other like term (*n*).

Every person who is interested in a marine adventure has an insurable interest (*o*). Thus shipowners have an insurable interest in the ship and freight (*p*), the owner of goods or the person at whose risk they are carried has an insurable risk in them (*q*), and the master or any member of the crew of a ship in respect of his wages (*r*). The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected; where, however, a subject-matter is insured "lost or not lost" the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract he knew of the loss, but the insurer did not (*s*).

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party" (*t*). "The assured must disclose to the insurer, before the contract is concluded" (*i.e.*, as soon as his proposal is accepted, whether the policy be then issued or not) (*u*), "every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the

(*m*) S. 3.

(*n*) S. 4.

(*o*) S. 5 (1).

(*p*) See *Camden v. Anderson*, 35 L. J. C. P. 172.

(*q*) See *Seagrave v. Union Marine Insurance Co.*, L. R. 1 C. P. 305.

(*r*) S. 11.

(*s*) S. 6 (1).

(*t*) S. 17. See *Greenhill v. Federal Insurance Co.*, [1927] 1 K. B., at p. 77; 95 L. J. K. B. 717.

(*u*) S. 21. Before the execution of the policy it is customary to draw up a memorandum of the terms, which is signed by the insurer, and this "slip" is in practice the final contract, and might, at Common Law, be looked at for collateral purposes: *Ionides v. Pacific Insurance Co.*, L. R. 6 Q. B. 674; 41 L. J. Q. B. 83; *affd.* L. R. 7 Q. B. 517. By s. 89 of the Act it is provided that where there is a duly stamped policy reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

ordinary course of business, ought to be known by him : if the assured fails to make such disclosure, the insurer may avoid the contract " (a). Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk (b). Whether any particular circumstance is or is not material is, in each case, a question of fact (c).

Where an insurance is effected for the assured by an agent, the agent must, subject to the previous section, disclose to the insurer every material circumstance known to himself, and is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him ; he must also disclose every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent (d).

Every material representation, whether as to fact, expectation or belief, made by the assured or his agent during the negotiations for the contract must be true, or the insurer may avoid the contract. A representation is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk ; a representation as to a matter of fact is true if it is substantially correct ; a representation as to a matter of expectation or belief is true if made in good faith ; whether a particular representation is or is not true is, in each case, a question of fact (e).

**The policy.**—A contract of marine insurance is inadmissible in evidence unless embodied in a marine policy in accordance with the Act, but the policy may be executed and issued after the contract is concluded (f).

The policy must specify " (i) the name of the assured or of some person who effects the insurance on his behalf ; (ii) the subject-matter insured and the risk insured against ; (iii) the voyage or period of time, or both, as the case may be, covered by the insurance ; (iv) the sum or sums insured ; (v) the name or names of the insurers " (g). It must be signed by or on behalf of the insurers ; in case of a corporation, the corporate seal is

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(a) S. 18 (1).

(b) S. 18 (2).

(c) S. 18 (4).

(d) S. 19.

(e) S. 20. As to waiver, see *Greenhill v. Federal Insurance Co., Ltd.*, [1927] 1 K. B. 65; 95 L. J. K. B. 717.

(f) S. 22.

(g) S. 23.

sufficient, but the subscription of a corporation is not *required* to be under seal (h).

The policy may be either a *voyage policy*, i.e., a contract to insure the subject-matter "at and from", or from one place to another, or a *time policy*, i.e., a contract to insure the subject-matter for a definite period of time (i). A time policy is void if it is made for a period of more than twelve months (k), but it is not void merely because it contains a "continuation clause", by reason of which it may become available for a period exceeding twelve months (l).

The subject-matter insured must be designated in the policy with reasonable certainty, but the nature and extent of the interest of the assured therein need not be specified in the policy (m).

A policy may be either a *valued* or an *unvalued* policy: the former specifies the agreed value of the subject-matter insured and, in the absence of fraud, is conclusive between insurer and assured as to its insurable value (n); the latter does not specify its value, but, subject to the limit of the sum insured, leaves it to be ascertained as provided for by the Act (o).

A *floating* policy is one which describes the insurance in general terms and leaves the name of the ship and other particulars to be defined by subsequent declaration made by indorsement on the policy or in other customary manner (p).

**Warranties.**—A warranty, in the sections of the Act relating to warranties (q), means a promissory warranty, i.e., a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts (r). Such a warranty is a *condition* which must be exactly complied with, whether material to the risk or not; otherwise, subject to any provision in the policy the insurer is

(h) S. 24.

(i) S. 25 (1).

(k) S. 25 (2).

(l) Finance Act, 1901, s. 11, e.g., an agreement that, if the ship is at sea on the expiration of the policy, the insurance shall hold good until its arrival.

(m) S. 26 (1) (2).

(n) For the general principles to be applied in determining the amount recoverable under a valued policy see *Elcock v Thomson*, [1949] 2 All E. R. 381.

(o) Ss. 27 and 28, and (as to ascertainment of insurable value), s. 18.

(p) S. 29. *Marine Insurance Co. v. Grimmer*, [1944] 2 All E. R. 197, C. A.

(q) Ss. 33—41.

(r) S. 33 (1).

discharged from liability as from the date of the breach of warranty (s). A warranty may be express or implied (t); but an express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy (u).

*Implied warranties.*—In a *voyage* policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured, i.e., reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured. Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation and equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage (x).

In a *time* policy there is *no* implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (y).

In a policy on goods or other moveables there is *no* implied warranty that they are seaworthy; but in a *voyage* policy on goods or moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy (z).

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, it shall be carried out in a lawful manner (a).

*The voyage.*—Where the subject-matter is insured by a voyage policy “at and from” or “from” a particular place it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied *condition* that the adventure shall be commenced within a reasonable time; otherwise the insurer may avoid the contract, unless the delay was caused by

(s) S. 33 (3).

(t) S. 33 (2).

(x) S. 39. See *Fiumana Societa di Navigazione v. Bunge & Co. Ltd.*, [1930] 2 K. B. 47; 99 L. J. K. B. 626, and the cases therein discussed.

(y) S. 39 (5).

(z) S. 40.

(a) S. 41.

(u) S. 35 (2).

circumstances known to him when the contract was concluded or he has waived the condition (b). If the ship sails from any port of departure or to any destination other than that specified in the policy the risk does not attach (c). If after the commencement of the risk there is a change of voyage or deviation from the voyage contemplated by the policy, or any unreasonable delay in prosecuting the voyage, the insurer is discharged as from the time of change or deviation or the time when the delay became unreasonable (d). Delay or deviation may, however, be excused in certain cases, as, *e.g.*, where authorised by any term in the policy, or where caused by circumstances beyond the control of the master or his employer, or where reasonably necessary for the safety of the subject-matter insured, or for the purpose of saving human life (e), or aiding a ship in distress where human life may be in danger, or where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship.

**Assignment of policy.**—A marine policy is assignable unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss. The assignee may sue in his own name, and the defendant may set up any defence which he could have set up if the action had been brought in the name of the person by or on behalf of whom the policy was effected. The assignment may be by indorsement thereon, or in other customary manner (f). If an assured has parted with or lost his interest in the subject-matter insured, and has not before or at the time of so doing agreed to assign the policy, any subsequent assignment of the policy is inoperative (g).

**Liability of insurer.**—Unless the policy otherwise provides, the insurer is liable for any loss proximately caused (h) by a peril insured against, but he is not liable for any loss which is not proximately caused by a peril insured against.

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(b) S. 42.

(c) Ss. 43, 44.

(d) Ss. 45—48.

(e) S. 49.

(f) S. 50.

(g) S. 51.

(h) The "proximate" cause of a loss is its "direct and immediate" cause. The antithesis of proximate cause is remote cause: *Becher, Gray & Co. v. London Assurance Corporation*, [1918] A. C., at p. 114; 87 L. J. K. B. 69.

For example, the word "war" in a policy of insurance includes civil war unless the context makes it clear that a different meaning should be given to the word. Thus, when trawlers were seized during the Spanish civil war in 1936 it was held that the phrase "excluding war risk" in a policy of marine insurance applied (i).

The onus of proving that the insured's loss has been caused by the peril insured against lies upon him and he does not discharge this onus by evidence equally consistent with the loss being caused by other circumstances not insured against, *e.g.*, evidence equally consistent with accidents during loading, bad stowage or defects in packing (k).

In particular (i) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the negligence or misconduct of the master or crew; (ii) unless the policy otherwise provides, an insurer on ship or goods is not liable for any loss caused proximately by delay, although the delay be caused by a peril insured against; (iii) unless the policy otherwise provides, he is not liable for ordinary wear and tear or leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not caused by maritime perils (l).

A loss may be total or partial (m). There is an *actual total loss* where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof (n). There is a *constructive total loss* where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable (o) or because it could not be preserved from actual

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(i) *Pesqueras y Secaderos de Bacalao de España S.A. v. Beer*, [1949] 1 All E. R. 845 n., H. L.

(k) *Neter and Co. v. Licenses and General Insurance Co*, 170 L. T. 165; [1944] 1 All E. R. 341.

(l) S. 55.

(m) S. 56.

(n) S. 57 (1).

(o) Where a master and crew upon Naval instructions left their ship which had been torpedoed and the ship was taken in tow by Naval authorities but sank 15 days later, it was *held*, upon a claim by the owners against the Crown for hiring up to the day she sank, that the master's action did not amount in the circumstances to an abandonment within the meaning of s. 60 (1), that recovery of the vessel was not unlikely on the day the master left her, that there had been no actual or constructive loss until the day upon which she sank, and that the owners were entitled to hiring charges until the day she sank: *Court Line, Ltd. v. R.*, 173 L. T. 162; [1945] 2 All E. R. 357, C. A.



total loss without an expenditure which would exceed its value after the expenditure had been incurred (p). Where there is a constructive total loss the assured may either treat the loss as a partial loss or abandon the subject-matter to the insurer and treat the loss as an actual total loss, in which case he must give notice of abandonment to the insurer, who is then entitled to take over the interest and proprietary rights of the assured in whatever remains of the subject-matter (q).

*Partial losses* include (i) general average losses and contributions; (ii) particular average losses and particular charges; (iii) salvage charges.

In every sea voyage there is an adventure common to several parties with different interests, e.g., the owners of the ship, the owners of the cargo, the persons entitled to freight, and the master and crew in respect of their wages. Where any one interest has to incur expenditure or make a sacrifice for the benefit of the common adventure, such a loss may be a general average loss, in respect of which the interest upon which the loss in the first instance has fallen may be entitled to obtain contribution from the other interests. With regard to this subject the following rules are laid down by the Act—

A *general average loss* is a loss caused by or consequential upon a *general average act*, which occurs whenever any extraordinary sacrifice or expenditure is “voluntarily and reasonably incurred in time of peril for the purpose of preserving the property imperilled in the common adventure” (r). A general average loss must be shared by all persons whose interests were at risk, and for that purpose the party on whom it falls is entitled to a rateable contribution from the other parties interested, termed a “general average contribution” (s). Subject to any provision in the policy, where an assured has incurred a general

(p) S. 60. As, e.g., in case of damage to a ship, where the cost of repairs would exceed its value when repaired, see *Captain J. A. Cates Tug, etc., Co. v. Franklin Insurance Co.*, [1927] A. C. 698; 96 L. J. K. B. 182. In *Société Belge des Bétons Société Anonyme v. London and Lancashire Insurance Co.*, 158 L. T. 352, the abandonment of harbour works to a Spanish revolutionary committee was held to be a constructive total loss.

(q) Ss. 61-63. No notice of abandonment is necessary where, when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him, nor where an insurer has re-insured his risk. Notice may also be waived by the insurer: s. 62 (7) (8) (9).

(r) S. 66 (1) (2).

(s) S. 66 (3). To give rise to a claim for general average contribution in respect of such a sacrifice (i) there must be a common danger, which must be real, and not merely apprehended by the master, however reasonably; (ii)

average expenditure, he may recover from the insurer the proportion of the loss which falls upon him, but in the case of a general average sacrifice he may recover from the insurer the whole loss without having enforced his right of contribution from the other parties liable to contribute (t). When two ships are in collision and general average expenditure is incurred by the master of one ship to save the adventure from imminent danger caused by the negligence of the other ship, the owners of cargo on the first ship have a right of action against the other ship to recover the amount of their general average contribution, since general average disbursements, whether primary by the innocent ship, or secondary by way of contribution to the primary sufferer from the other general average parties, are the direct consequences of the negligence of the wrongdoing ship. And it is immaterial to the cargo owners' claim that both ships are to blame for the collision and that the ship carrying their cargo has limited her liability (u). Similarly, subject to any provision in the policy, where the assured has paid or is liable to pay a general average contribution in respect of the subject insured, he may recover it from the insurer (w). But, in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against (a).

A "particular average loss is any partial loss of the subject-matter insured, caused by a peril insured against, which is not a general average loss" (b). In respect of such a loss no right to contribution exists.

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there must be a necessity for a sacrifice; (iii) the sacrifice must be voluntary; (iv) it must be a real sacrifice, and not a mere destruction and casting off of that which had already become lost and consequently of no value; (v) there must be a saving of the imperilled property through the sacrifice; (vi) the common danger must not arise through any default for which the interest claiming a general average contribution is liable in law. See *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B., at p. 209; 99 L. J. K. B. 653; affirmed, [1931] A. C. 726; 100 L. J. K. B. 673. For a discussion of the general principles governing general average, see also *Svenden v. Wallace*, 13 Q. B. D. 69; 53 L. J. Q. B. 615.

(t) S. 66 (4). The insurer is then subrogated to the rights of the assured as against such other parties.

(u) *Morrison S.S. Co. v. Greystoke Castle (Cargo Owners)*, [1947] A. C. 265; [1946] 2 All E. R. 696, H. L.

(x) S. 66 (5).

(a) S. 66 (6).

(b) S. 64 (1).

*Particular charges* are "expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured other than general average and salvage charges" (c).

*Salvage charges* are "the charges recoverable under maritime law by a salvor independently of contract" (d). They do not include the expenses of services rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may, however, be recovered as particular charges, or as a general average loss, according to the circumstances under which they were incurred (e).

Salvage is the reward payable for services rendered to a vessel in distress (f). It is a claim recognised only as connected with vessels and it is not recognised under the common law (g). "The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject (h). The essentials of a salvage service are (i) danger to the subject of the service (i); (ii) the service must be voluntary and not such as is due under an existing contract (k); (iii) the service must be successful (l), or must at least contribute to the ultimate safety of its subject (m). "Salvage" must be distinguished from "towage". The obligation to pay for salvage services may arise irrespective of any contract and the condition

(c) S. 64 (2).

(d) S. 65 (2).

(e) *Ibid.*

(f) For various definitions, see *The Gas Float Whitton* (No. 2), [1896] P. 42; 65 L. J. Adm. 17.

(g) *Sorrell v. Paget*, [1949] 2 All E. R. 609, C. A.

(h) *Cargo ex Port Victor*, [1901] P., at p. 247.

(i) *The Strathnaver*, 1 App. Cas. 58; *The Aglaia*, 13 P. D. 160; 57 L. J. Adm. 106.

(k) *Cargo ex Schiller*, 46 L. J. Adm. 9; 2 P. D., at p. 149; *The Leon Blum*, [1915] P. 90; affirmed [1915] P. 290. Hence the crew of the salvaged vessel cannot claim as salvors unless their contract of service has been terminated as, e.g., by a *bona fide* abandonment of the ship: *The Florence*, 16 Jur. 572.

(l) The service is still successful and a benefit is still conferred upon the owner even though immediately after the salvage service, the salvors, who were the Admiralty, again seized the vessel as prize: *Admiralty Commissioners v. "Josefina Thorden"* (Owners), 172 L. T. 186; [1945] 1 All E. R. 314.

(m) *The Camelia*, 9 P. D. 27; 53 L. J. Adm. 12; *The August Korff*, [1903] 1 P. 166; 72 L. J. P. 53.

of danger to the ship is most essential in salvage. The obligation to pay for towage services, however, only arises from a contract, express or implied, for one vessel to expedite the voyage of another, when nothing more is required than the accelerating of her voyage (n).

The only subjects in respect of the saving of which salvage reward could originally be claimed were a ship, or part of a ship, or her apparel or cargo, or the wreck of them, or freight (o); but under s. 544 of the *Merchant Shipping Act*, 1894, a claim for salvage reward for the saving of life may be made, provided that some property has been preserved. Services rendered by a ship of His Majesty's Navy could not formerly found a claim for salvage reward, but this disability has been removed by the *Merchant Shipping (Salvage) Act*, 1916, where the ship rendering the services is specially equipped with salvage plant or is a tug.

A salvor, furthermore, is under a duty to use reasonable skill and care the breach of which will entail liability. If the salvor professes to render salvage services there is also a duty to provide suitable equipment according to the circumstances of the case. A salvor, as any other person, falls within the common law principle of duty of care as laid down in *Donoghue v. Stevenson* (p), i.e., his duty of "diligence" is to be measured by such degree of skill and care as is requisite in the circumstances to safeguard the interest of the shipowner (q).

**Measure of indemnity.**—In case of a *total loss* the measure of indemnity is (i) if the policy be a valued policy, the sum fixed by the policy; (ii) if the policy be an unvalued policy, the insurable value of the subject-matter (r). In case of a *partial loss* the indemnity is fixed by rules laid down by the Act (s).

It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purposes of averting or minimising a loss (t). The policy usually contains a *suing and labouring clause*, i.e., a clause by which the insurer agrees that the assured shall be at liberty, without prejudice to

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(n) *The Troilus*, [1950] 1 All E. R. 103, C. A.

(o) *The Gas Float Whitton* (No. 2), [1896] P., at p. 63; 66 L. J. Adm. 99.

(p) *Ante*, p. 361.

(q) *Anglo Saxon Petroleum Co. v. Dament*; *Same v. R.*, [1947] K. B. 794; [1948] L. J. R. 158, C. A.

(r) S. 68.

(s) Ss. 69–75.

(t) S. 78 (4).

the insurance, to "sue, labour, and travel for", that is to say, to take all necessary steps for the protection, preservation and recovery of the property insured and agrees also to contribute to any expenditure incurred for such purposes; this agreement also embodies a *waiver clause* by which it is declared that no acts of the insurer or assured in recovering, saving or preserving the property insured shall be considered as an acceptance of abandonment or a waiver of the right to abandon (u). It is provided by the Act that, where the policy contains a suing and labouring clause, the agreement therein contained is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, although the insurer may have paid for a total loss, or the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage (a). General average losses and contributions, and salvage charges and expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause (b).

**Return of premium.**—Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is returnable to the assured. Where the consideration is apportionable, and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, returnable (c).

#### SUB-SECTION 2.—*Fire Insurance*

A contract of fire insurance is also simply a contract of indemnity, being only a contract by which, in consideration of

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(u) See the form of policy in the First Schedule to the Act.

(a) S. 78 (1). The policy usually contains a clause termed the *memorandum*, qualifying the measure of indemnity for partial losses. The form in the policy given in the First Schedule to the Act is as follows: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under 5 pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under 3 pounds per cent. unless general, or the ship be stranded."

(b) S. 78 (2) (3).

(c) S. 84 (1) (2). Particular examples are given by s. 84 (3). Thus, where the policy is void or is avoided by the insurer before the commencement of the risk, the premium is returnable if there has been no fraud or illegality on the part of the assured; and, if the subject-matter insured, or part of it, has never been imperilled, the premium or a proportionate part is returnable. The premium or a proportionate part may also be returnable by agreement: s. 83.

the payment of a premium, the insurer undertakes to make good to the assured any loss which he may suffer from fire.

The amount payable is merely such a sum, not being in excess of the sum insured for, as will indemnify the assured against the loss which he has actually suffered (d).

Thus, in the case of *Darrell v. Tibbetts*, a landlord had insured his house against damage by fire, including gas explosions; his tenants, by the terms of their lease, were also bound to make good any such damage. An explosion having occurred by the act of a third party, the landlord received payment from the insurance company. The tenants subsequently obtained compensation from the third party, and made good the damage. It was accordingly held that the landlord was bound to repay the insurance company, "otherwise he would be not merely indemnified; he would be paid twice over". If, however, the tenants had not made good the damage, and had refused to do so, the insurers, by virtue of their right of subrogation, might have sued them in the name of the landlord (e).

A contract of fire insurance is a mere personal contract, and, unless it is assigned, no action can be maintained upon it except between the original parties to it (f). Nor can it be assigned without the consent of the insurer (g).

Nor without express assignment does it pass to the purchaser under a contract for sale of the property insured.

Thus, in *Rayner v. Preston* (h), A, having previously insured a house, contracted to sell it to B, the contract containing no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire and A was paid by the insurance company. It was held that the purchaser, who had subsequently completed his contract, was not entitled as against the vendor to the benefit of the insurance.

The vendor in such a case has, so long as he is unpaid by the purchaser, the right to recover from the insurance company (i);

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(d) See *Castellain v. Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366, where the principles upon which the amount of the indemnity must be calculated are fully discussed. In case of a total loss it is *prima facie* the market value of the property at the time of the fire. And see the principles laid down by Morris, J., in *Elcock v. Thomson*, [1949] 2 All E. R. 381, to determine the amount recoverable in respect of loss or damage under a valued fire insurance policy.

(e) 5 Q. B. D. 560; 50 L. J. Q. B. 33.

(f) *Rayner v. Preston*, 18 Ch. D., at p. 11; 50 L. J. Ch. 472.

(g) *Sadlers' Co. v. Badcock*, 2 Atk. 554.

(h) *Ubi supra*.

(i) *Collingridge v. Royal Exchange Association*, 3 Q. B. D. 173; 47 L. J. Q. B. 32.

but if, after payment by the insurance company, he receives the purchase-money, he must, out of it, repay the insurance company (k).

Now, however, by s. 47 of the *Law of Property Act, 1925*, where, after the date of any contract made after 1925 for the sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to, or destruction of, property included in the contract, the money shall (subject (i) to any contrary stipulation contained in the contract, and (ii) to any requisite consents of the insurers, and (iii) the payment by the purchaser of the proportionate part of the premium from the date of the contract) be held or receivable by the vendor on behalf of the purchaser, and paid to him on completion of the sale or exchange or so soon thereafter as it is received by the vendor (l).

By s. 88 of the *Metropolitan Building Act, 1774* (m), in case of a house or other building, any person interested may require the insurance money to be laid out in repairs or rebuilding. In other cases, subject to any contrary condition in the policy, "the subject-matter of the contract is money and money only" (n). The insurers cannot, therefore, elect to reinstate the property nor can the assured be compelled to do so.

### SUB-SECTION 3.—*Life Insurance*

A contract of life insurance is not a contract of indemnity, but a contract to pay a fixed sum on the death of a person in consideration of the immediate payment of a smaller sum or of periodical payment of certain premiums during his life.

It may be on the life of a third person for the benefit of the assured or upon the life of the assured for the benefit of the third person. In the latter case the name of the third person must be inserted in the policy as well as the name of the insured (o).

The *Life Assurance Act, 1774* (p), does not prevent a person

(k) *Castellain v. Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366. See also *Phoenix Assurance Co. v. Spooner*, [1905] 2 K. B. 753; 74 L. J. K. B. 792; *Meacock v. Bryant & Co.*, 167 L. T. 871; 69 T. L. R. 51.

(l) As to the application of money received on an insurance of mortgaged property, see s. 108 of the *Law of Property Act, 1925*, and *Halifax Building Society v. Keithley*, [1931] 2 K. B. 248.

(m) This section has been held not to be limited to the Metropolitan area, but to be of general application: *Sinnott v. Bowden*, [1912] 2 Ch. 414, following earlier decisions to the same effect.

(n) *Rayner v. Preston*, 18 Ch. D., at p. 9.

(o) *Ante*, p. 557; and see *Evans v. Bignold*, L. R. 4 Q. B. 622; 38 L. J. Q. B. 293.

(p) *Ante*, p. 557.

from insuring his own life for any amount (*q*), or a husband from insuring the life of his wife (*r*), or a wife from insuring the life of her husband (*s*). And, by s. 11 of the *Married Women's Property Act*, 1882, it is provided (i) that a married woman may effect a policy upon her own life or the life of her husband for her own benefit; and (ii) that a policy effected by any man on his own life and expressed to be for the benefit of his wife or children, or any of them, or a policy effected by a woman on her own life and expressed to be for the benefit of her husband or children, or any of them, shall create a trust in favour of the persons for whose benefit it is effected, and that the money payable under any such policy shall not form part of the estate of the insured or be liable to his or her debts: provided that, if the policy was effected and the premiums were paid with intent to defeat the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid.

But a parent cannot insure the life of his child unless he has some pecuniary interest therein (*t*); nor has a child, merely by virtue of relationship, an insurable interest in the life of his or her parent (*u*); nor have brothers or sisters, as such, an insurable interest in each other's lives (*a*).

A creditor has an insurable interest in the life of his debtor to the extent of his debt, and the loss of this interest during the life of the debtor will not make the policy void (*b*).

The amount for which a policy of life insurance may be effected is limited to the interest of the insured at the time of

(*q*) *Wainwright v. Bland*, 1 Moo. & R. 481; 5 L. J. Ex. 147; see also *Griffiths v. Fleming* (*infra*).

(*r*) *Griffiths v. Fleming*, [1909] 1 K. B. 805; 78 L. J. K. B. 567.

(*s*) *Reed v. Royal Exchange Assurance Co.*, Peake Add. Cas. 70; see also *Griffiths v. Fleming* (*supra*).

(*t*) *Halford v. Kymer*, 10 B. & C. 724; 8 L. J. K. B. 811; *Worthington v. Curtis*, 1 Ch. D. 419; 45 L. J. Ch. 259.

(*u*) *Howard v. Refuge Friendly Society*, 54 L. T. 644. A legal, but not a moral, obligation to pay the funeral expenses of the person whose life is insured creates an insurable interest: *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558; 73 L. J. K. B. 373.

(*a*) *Evanston v. Crooks*, 106 L. T. 261. But under the Friendly Societies Acts, 1896 to 1929, the Industrial Assurance Acts, 1923 to 1929, and the Industrial Assurance and Friendly Societies Act, 1948, friendly societies and industrial assurance companies may issue certain policies on the life of a parent, child (under ten years of age), grandparent, grandchild, brother or sister.

(*b*) *Dalby v. India, etc., Life Assurance Co.*, 15 C. B. 365; 24 L. J. C. P. 2; 100 R. R. 389; *Law v. London, etc., Life Policy Co.*, 24 L. J. Ch. 196.



effecting the policy (c). If, therefore, several policies are effected with different insurers, the insured cannot recover in all more than his insurable interest (d). But if at the time of effecting the policy the insured has an insurable interest, the policy will not be avoided because his interest subsequently terminates. Thus, if a creditor insures the life of his debtor, the policy is not avoided because he is afterwards paid the debt; and if he has kept up payment of the premiums he can recover from the insurer (e).

A frequent condition of a policy of life insurance is that the policy shall be avoided if the assured should die by the hands of justice or by suicide. This, on considerations of public policy, would result even in the absence of any express condition (f), unless in the case of suicide the assured was of unsound mind (g). But an express condition may be so worded as to avoid the policy although the assured was of unsound mind when he committed suicide (g).

Thus, in the case of *Ellinger v. Mutual Life Insurance Co. of New York* (h), the policy was based upon an application, stated to be the basis of the contract, containing a clause by which the assured "warranted and agreed" not to commit suicide, whether sane or insane, within a year. It was held that this warranty was a condition limiting the liability of the defendants upon the policy.

Such an express condition is common, but is often qualified by a further condition that the avoidance of the policy shall not prejudice the *bona fide* interests of third persons based on valuable consideration (i).

Where a husband has effected an insurance on his life for the benefit of his wife his executors can maintain an action on the policy, although the death of the husband was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under s. 11 of the Married Women's Property

(c) *Ante*, p. 557. Premiums paid under a mere wager policy cannot be recovered (*Howard v. Refuge Friendly Society* (*ubi supra*); *Harse v. Pearl Life Assurance Co.* (*ubi supra*); but see *Elson v. Crookes*, 106 L. T. 462).

(d) *Hebbon v. West*, 3 B. & S. 579; 32 L. J. Q. B. 85.

(e) *Dalby v. India, etc., Assurance Co.*, 15 C. B. 365; 24 L. J. C. P. 2.

(f) *Amicable Society v. Bolland*, 4 Bli. (n.s.) 194; *Beresford v. Royal Insurance Co.*, [1938] A. C. 586; 107 L. J. K. B. 464.

(g) *Horn v. Anglo-Australian, etc., Insurance Co.*, 30 L. J. Ch. 511.

(h) [1905] 1 K. B. 31; 74 L. J. K. B. 39.

(i) See *White v. British Empire, etc., Insurance Co.*, L. R. 7 Eq. 394; 38 L. J. Ch. 53; *Cily Bank v. Sovereign Life Assurance Co.*, 50 L. T. 565; *Wigan v. English and Scottish Law Life Assurance*, [1909] 1 Ch. 291; 78 L. J. Ch. 120.

Act, 1882, fails by reason of her crime (*k*); but a resulting trust arises in favour of her husband, and his executors can recover the insurance money as part of his estate.

*Assignment.*—A policy of life assurance might always be, and still may be, the subject of an equitable assignment.

And, by s. 5 of the *Policies of Assurance Act*, 1867, a policy of life insurance may be assigned either by indorsement on the policy or by a separate instrument in the words or to the effect set out in the Schedule to the Act. By s. 1 of the Act any person entitled by assignment or other derivative title to a policy of insurance, and possessing at the time of action brought the right in Equity to receive and give a discharge for the moneys thereby assured, may sue at law in his own name to recover such moneys. But by s. 2 of the Act the assignment is subject to equities (*l*). And by s. 3 of the Act the right to sue does not arise until written notice of the date and purport of the assignment has been given to the assurance company at its principal place of business, or one of its principal places of business, in England, Scotland, or Ireland, and the date on which notice is given regulates the priorities of all claims under any assignment (*m*). This section, however, applies only as between the assurance company and the persons interested in the policy; a subsequent assignee cannot, by giving notice first, acquire priority over a previous assignment of which he had notice (*n*).

By s. 118 of the Stamp Act, 1891, no assignment of a policy of life insurance confers on the assignee any right to sue for the moneys assured or secured thereby or to give a valid discharge for the same, unless the assignment is duly stamped.

A policy of life insurance may also be assigned under s. 186 of the *Law of Property Act*, 1925 (*o*), so as to give the assignee the legal right thereto and all legal remedies in respect thereof.

#### SUB-SECTION 4.—*Accident Insurance*

A contract of accident insurance may be either a contract to pay a fixed sum on the happening of some particular accident, as in the case of insurance against accidents causing personal injury, or it may be a contract to indemnify the assured against some particular liability, as, for example, the insurance of an

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(*k*) *Cleaver v. Mutual Reserve Fund Association*, [1892] 1 Q. B. 147; 61 L. J. Q. B. 128.

(*l*) *Ante*, p. 197.

(*m*) By s. 4 such place or places of business must be stated in every policy.

(*n*) *Newman v. Newman*, 28 Ch. D. 674; 54 L. J. Ch. 598.

(*o*) *Ante*, p. 195.

employer against claims under the Workmen's Compensation Acts, or it may be both a contract to pay a fixed sum and a contract of indemnity.

A familiar type of the last class is the ordinary motor vehicle insurance policy, which usually comprises (*inter alia*):—

- i. A contract of indemnity against loss of, or damage to, a named vehicle and its accessories, etc., from certain specified causes, while being used for the purposes described in the policy:
- ii. A contract of indemnity against "third party risks", i.e., liabilities incurred in respect of the death or injury to the person or property of third persons caused by or in connection with the vehicle. This indemnity frequently extends to other specified persons while driving the vehicle with the consent of the insured:
- iii. A contract to pay compensation to the insured and his or her wife or husband to a specified amount in the event of death or bodily injury solely caused by "violent, accidental, external and visible means" (p) (or similar words) in direct connection with the vehicle.

*Compulsory Insurance of Motor Vehicles.*—This is governed by Part II (ss. 35–44) of the *Road Traffic Act, 1930*, as amended by Part II (ss. 10–17) of the *Road Traffic Act, 1934*.

By s. 35 of the *Road Traffic Act, 1930*, no person may use, or cause or permit any other person to use, a motor vehicle on a road (q) unless there is in force in relation to the user of the vehicle, by him or such other person, such a policy of insurance (including a "covering note") or security in respect of third party risks as complies with the requirements of Part II of the Act. It is sufficient for the purpose of s. 35 if at the material time there is a policy in force covering the then user of the vehicle in respect of third party risks: the fact that the driver's personal liability is not covered by such policy is immaterial (r). Certain vehicles, such as vehicles owned by a police authority or local authority, invalid carriages and tramcars or trolley vehicles used under statutory powers are, however, exempted from the provisions of this section.

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(p) As to the meaning of these words, see *Hamlyn v Crown Accident Insurance Co.*, [1898] 1 Q. B. 750, 62 L. J. Q. B. 409; *Scarr v. General Accident Insurance Corporation*, [1905] 1 K. B. 837; 74 L. J. K. B. 227; *Smith v Cornhill Insurance Co.*, 54 T. L. R. 869.

(q) As defined by s. 121 (1) of the *Road Traffic Act, 1930*

(r) *Ellis v Hinds*, [1947] K. B. 476, *Marsh v. Moores*, [1949] 2 All E. R. 27, D. C.

By s. 86 a policy of insurance must, in order to comply with the requirements of the Act, be issued by a person who is an "authorised insurer" within the meaning of this Part of the Act and must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the *death of or bodily injury* to any person caused by or arising out of the use of the vehicle on a road.

But the policy is not required to cover

- (i) liability in respect of the death of, or bodily injury to, a person in the employment of a person insured, and arising out of and in the course of his employment; or
- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or under a contract of employment, liability in respect of the death of, or bodily injury to, persons being carried in, or entering or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise; or
- (iii) any contractual liability.

Certain hospital and medical expenses must also be paid by the insurer (s).

The same section also provides that, notwithstanding anything in any enactment a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

By virtue of this provision the Life Assurance, his Pa<sup>1774</sup>, does not apply to policies issued under this section, <sup>the in</sup> <sup>sub 3</sup> <sup>rende</sup>

The section further provides that a policy shall be of no effect for the purposes of this Part of the Act unless and until the insurer has delivered to the person by whom the policy is effected a "certificate of insurance" in the prescribed form.

By s. 87 a "security" must be given either by an "authorised insurer" or by some body of persons complying with the requirements of the Act and must consist of an undertaking to make good up to £25,000 in the case of a public service vehicle, and, in any other case, up to £5,000, any failure by the owner of the

(s) S. 86 (2), and see s. 88 of the Road and Rail Traffic Act, 1933, and s. 17 of the Road Traffic Act, 1934

(t) *Tattersall v. Drysdale*, [1935] 2 K. B. 174. See *ante*, p. 100.

himself, or any other persons specified in the security to discharge any such liability as is required to be covered by a policy of insurance and may be incurred by him or them.

Such a "security" is of no effect unless and until a "certificate of security" in the prescribed form has been issued by the person giving it to the person to whom it is given.

By s. 88 any condition in a policy or security issued or given for the purposes of this Part of the Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done *after* the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with claims arising in respect of the liabilities that must be covered under s. 86 of the Act.

Nothing in this section, however, shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

The foregoing provisions of the Act of 1980 were extended by Part II of the *Road Traffic Act, 1984*, which imposes on insurers the duty of paying to third parties the amount of any judgment obtained by them in respect of any liability required to be covered by the Act and gives to third parties the right to sue the insurers for that amount.

The effect of this Act is that, after judgment has been obtained against the assured, the insurer can repudiate liability on the ground that the assured was not covered by the policy. It is with respect to the accident in respect of which the claim arose or (ii) that, apart from any condition in the policy, he is entitled to avoid it on the ground of non-disclosure or misrepresentation.

By s. 10 of this Act it is provided—

1. That if, after a certificate of insurance under the Act of 1980 has been delivered to the person by whom a policy has been effected, judgment in respect of any liability required to be covered by s. 86 of that Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum

payable thereunder in respect of the liability, including costs and any interest payable on the judgment.

2. That no sum shall be payable by an insurer under the foregoing provisions of this section—

- (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, he had notice of the bringing of the proceedings; or
- (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
- (c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either
  - (i) before that event the certificate was surrendered to the insurer, or the person to whom it was delivered made a statutory declaration that it had been lost or destroyed; or
  - (ii) after the said event, but before the expiration of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom it was delivered made such a statutory declaration, or
  - (iii) either before or after the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part of the Act in respect of his failure to surrender the certificate.

3. That no sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, *apart from any provision contained in the policy*, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled to do so *apart from any condition contained in it*:

Provided that an insurer who has obtained such a declaration in an action shall not be entitled to the benefit of this sub-section as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within

seven days after its commencement he has given notice to the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is given shall be entitled if he thinks fit to be made a party thereto.

4. That if the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

By s. 12 it is provided that where a certificate of insurance has been delivered under s. 36 of the Act of 1980 to the person by whom a policy has been effected, certain restrictions on the scope of the policy shall be of no effect as regards third party risks. The restrictions in question are those which relate to—

- (a) the age or physical or mental condition of the person driving the vehicle;
- (b) the condition of the vehicle;
- (c) the number of persons carried;
- (d) the weight or character of the goods carried;
- (e) the times at which or the areas within which the vehicle is used;
- (f) the horsepower of the vehicle;
- (g) the carrying of any particular apparatus;
- (h) the carrying on the vehicle of any means of identification other than that required to be carried by or under the Roads Act, 1920.

But nothing in this section requires an insurer to pay any sum in respect of the liability of any person otherwise than in discharge of that liability, and any sum paid by an insurer in discharge of any liability of any person which is covered by the policy by virtue only of this section is recoverable by the insurer from that person.

By s. 1 of the *Third Parties (Rights against Insurers) Act*, 1980, it is provided that where under any contract of insurance a person is insured against liabilities to third parties, then

- i. in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors;
- ii. in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, or of a receiver or manager

of its business being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property subject to the charge;

if, either before or after that event, any such liability is incurred by the insured, his rights against the insurer under the contract in respect of such liability shall be transferred to and vest in the third party to whom the liability was incurred (a).

Where an order is made under s. 180 of the *Bankruptcy Act*, 1914, for the administration in bankruptcy of the estate of a deceased debtor, if any debt provable in bankruptcy is owing by the deceased in respect of a liability to a third party against which he was insured, the deceased debtor's rights against the insurer in respect of that liability will be transferred to and vest in the person to whom the debt is owing (b).

In so far as any contract of insurance made after the commencement of the Act (July 10, 1930), in respect of any liability of the insured to third parties, purports to avoid the contract or to alter the rights of the parties thereunder upon the happening of any of the events in the foregoing paragraphs, the contract is of no effect (c).

Upon a transfer under the foregoing provisions the insurer will, subject to section 8 of the Act, be under the same liability to the third party as he would have been to the insured, but—

- i. if the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in the Act affects the rights of the insured against the insurer in respect of the excess, and
- ii. if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in the Act affects the rights of the third party against the insured in respect of the balance (d).

By s. 8 of the Act it is provided that where the insured has become bankrupt or where, in the case of a company, a winding-up order has been made, no agreement made between the insurer and the insured after liability has been incurred to a third party and after the commencement of the bankruptcy or winding-up, nor any waiver, assignment, or other disposition made by, or payment made to, the insured after the commencement aforesaid shall

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(a) S. 1 (1)  
(b) S. 1. (2)  
(c) S. 1 (3)  
(d) S. 1 (4).



have any effect to defeat or affect the rights transferred to the third party under the Act.

The Act does not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company (e).

By s. 11 of the *Road Traffic Act, 1934*, it is provided that, where a certificate of insurance has been delivered under s. 36 of the *Road Traffic Act, 1930*, the happening in relation to any person insured by the policy of any event specified in s. 1 (1) and (2) of the *Third Parties (Rights against Insurers) Act, 1930*, shall not affect any such liability of that person as is required to be covered by insurance under the Act of 1930. But nothing in this section is to affect any rights against the insurers conferred on third parties by the *Road Traffic Act, 1930*.

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(e) S. 1 (6).

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## CHAPTER IV

## BAILMENTS, CONTRACTS OF CARRIAGE AND AFFREIGHTMENT

SECTION 1.—*General Rules Applicable to Bailments*

A **BAILMENT** consists in the delivery by one person, termed the bailor, of the *possession* of goods to another person, termed the bailee, upon some condition or trust (*a*).

In the leading case of *Coggs v. Bernard* (*b*) bailments were classified as follows:—

1. *Depositum*.—When goods are delivered to the bailee to be kept for the use of the bailor, and where the bailee is to have no reward.

2. *Commodatum*.—When goods are lent, to be used by the borrower without payment.

3. *Locatio rei*.—When goods are let out for hire.

4. *Vadium*.—When goods are pawned or pledged.

5. *Locatio operis faciendi*.—When goods are delivered to be kept or carried, or for something to be done to them, for a reward to be paid by the bailor to the bailee.

6. *Mandatum*.—When goods are delivered to someone who is to carry them or do something to them without reward.

With regard to all bailments the following points must be noted:—

A bailment can exist only in respect of personal chattels. Thus, permission to use real property, as, *e.g.*, a shed, does not constitute a bailment but merely confers a licence (*c*).

A bailment consists in the delivery of the *possession* of goods; a delivery of goods by a man to his servant does not therefore create a bailment, because the servant merely has the custody or detention, the master retaining constructive possession by the agency of his servant (*d*).

A *constructive delivery* of goods may take place by *attornment*, *i.e.*, when, without any physical transfer, a change in the

(*a*) *R. v. McDonald*, 15 Q. B. D., at pp. 327, 328.

(*b*) 2 Ld. Raym. 909.

(*c*) *Williams v. Jones*, 8 H. & C. 602; 13 L. T. 800.

(*d*) *R. v. Cooke*, L. R. 1 C. C. R., at p. 800; 40 L. J. M. C. 68.

nature of a person's possession is effected by agreement (e). Thus, if a vendor of goods, instead of delivering them to the purchaser, agrees to keep them in his warehouse without charge, there is a constructive delivery from the vendor to the purchaser, and a constructive re-delivery from the purchaser to the vendor as bailee (f). So also if the goods are in the possession of a third person who, on the instructions of the vendor, agrees to hold them on behalf of the purchaser, he becomes, by attornment, a bailee for the latter (g). Where, however, without any request or previous communication, goods are sent to or placed upon the premises of a person who has in no way held himself out as willing to receive them, he is not thereby constituted a bailee of such goods (h).

A bailment may be constituted by the mere delivery and acceptance of possession, entirely independently of any contract between the parties. Accordingly an infant may be a bailee of goods although they were not necessities in respect of which he could make a valid contract (i). In most cases, however, a bailment is accompanied by an express contract, so that the rights and liabilities of a bailor and bailee are of two kinds, i.e., those which arise at Common Law from the mere bailment, and those which have their origin in any express contract (k).

The bailee during the bailment has what is sometimes called a "special property" in the goods; that is to say, although the general property remains in the bailor, the bailee has the right to possess, and hence he may exercise over the goods all rights annexed by law to the possession except so far as they may be inconsistent with the nature of the bailment or excluded by express contract; thus as against a wrongdoer he may maintain an action for trespass, conversion, or negligence (l).

(e) *Mills v. Charlesworth*, 25 Q. B. D., at p. 425.

(f) *Castle v. Swooner*, 66 H. & N. 828; 30 L. J. Ex. 310; *Elmore v. Stone*, 1 Taunt. 458.

(g) *Gosling v. Birnie*, 7 Bing. 389; 9 L. J. C. P. 105; *Holl v. Griffin*, 10 Bing. 246; and see s. 45 (3) of the Sale of Goods Act, 1898. See also *Dublin City Distillery, Ltd. v. Doherty*, [1914] A. C. 823; 83 L. J. P. C. 265, where the authorities on constructive possession are reviewed.

(h) *Lethbridge v. Phillips*, 2 Stark. 544; *Howard v. Harris*, 1 C. & E. 253; *Newith v. Over Darwen, etc., Society*, 63 L. J. Q. B. 290.

(i) *R. v. McDonald*, 15 Q. B. D. 323.

(k) See *Corbett v. Packington*, 5 L. J. K. B. 142; 6 B. & C. 268; *Lilley v. Doubleday*, 7 Q. B. D. 510; 51 L. J. Q. B. 310.

(l) *Nyberg v. Handelaar*, [1892] 2 Q. B. 201; 61 L. J. Q. B. 709; *The Winkfield*, [1902] P. 42; 71 L. J. P. 21; see also pp. 321, 330. As to the expression "special property", see *The Odessa*, [1916] 1 A. C., at p. 159; 85 L. J. P. C. 49, where it is pointed out that "special interest" would be a more accurate expression.

If, however, the bailee deals with the goods in a manner which is inconsistent with the nature of the bailment, or contrary to its express terms, there is a determination of the bailment, and the right to the possession reverts in the bailor, who may maintain an action against the bailee for conversion (*m*), and for any damage caused to the goods in consequence of his improper dealing with them, unless such damage is due to a cause independent of his acts and inherent in the goods themselves (*n*).

Thus, in *Lilley v. Doubleday* (*o*), the bailee contracted to warehouse goods at a particular place, but warehoused part of them at another place, where, without any negligence on his part, they were destroyed by fire. *Held*, that, in consequence of his breach of contract, he was liable for the loss of the goods.

If, on determination of the bailment, the bailee refuses to re-deliver or cannot re-deliver the goods, he is liable, according to the circumstances of the case, to an action of detinue, conversion, negligence or breach of contract (*p*).

Subject to exceptions in the case of persons exercising a public employment, a bailee is not liable if, during the bailment, the goods are lost or damaged without any default or negligence on his part (*q*). The onus is, however, on him to show that any loss or damage was not attributable to his default or negligence (*r*).

If, however, the goods are lost or injured by his negligence or default, he is liable, subject to any express agreement to the contrary, to an action for damages, which, if based upon the breach of any express contract, will be an action of contract (*s*), but if based merely on a breach of his Common Law duties, will be an action of detinue or negligence. It is well established that a gratuitous bailee is only liable for gross negligence. It is also well established that where a bailee is not a gratuitous bailee he is bound to take a higher degree of care, not susceptible of accurate definition, but something appropriate to the circumstances in which the bailee is given something for the pains to which he is put in keeping the article. Consequently, where a

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(*m*) *Cooper v. Willmott*, 1 C. B. 672; 14 L. J. C. P. 109; *Plasseyed Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd.*, [1912] 2 K. B., at p. 351; 81 L. J. K. B. 728. As to the right of a pledgee to deal with a chattel pledged to him, see, however, *post*, Chapter V, Section 8. Sub-section 2.

(*n*) *Cocks v. Bernard*, 2 Ld. Raym., at p. 915.

(*o*) *Ubi supra*.

(*p*) See *Wilkinson v. Verity*, L. R. 6 C. P. 206; 40 L. J. C. P. 141; 24 L. T. 82; *Coldman v. Hill*, [1919] 1 K. B. 448; 88 L. J. K. B. 491.

(*q*) *Taylor v. Caldwell*, 3 B. & S., at pp. 838, 839; 32 L. J. Q. B. 164.

(*r*) *Coldman v. Hill* (*ubi supra*).

(*s*) *Coldman v. Hill* (*ubi supra*); *Turner v. Stallibrass*, [1898] 1 Q. B. 56; 67 L. J. Q. B. 72.

bailee is compensated for his pains, he ceases to be a gratuitous bailee and is bound to take a higher degree of care, such at least as men of common prudence would take in regard to the class of article which falls into their possession.

Thus, where the plaintiff entered the defendants' mental hospital and they took charge of her jewellery, storing it in a room into which a burglar would have had no difficulty in entering, and the plaintiff's sister had told the defendants that the jewellery was of value, when it was stolen the defendants were held liable as bailees (but not as gratuitous bailees) because they had not taken a reasonable degree of care (t).

A bailee may, however, by special contract exempt himself from liability for negligence, and, except in the case of a common carrier, a stipulation to that effect will relieve him from liability for the negligence of his servants, even though they are not expressly mentioned (u).

A bailee is always bound to take reasonable care for the security and re-delivery of the chattel bailed, and that obligation includes not only the duty of taking all reasonable precautions to obviate risks of injury, but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred. If therefore a bailee finds goods in his control threatened by a danger to prevent which may involve unusual exertion or expenditure outside his usual duty, he must either inform the owner of the threatened danger, if he can by so doing get instructions to act, or enable the owner to act in time to avert the danger; or, if he cannot give the owner information in time, he must act as agent of necessity (w) on behalf of and at the expense of the owner, taking the steps which a reasonable owner would take in defence of property of the value in question (x).

Thus, in *Coldman v. Hill* (x), the defendant was a farmer who took in cattle for agistment. Some of these cattle were stolen without any fault on his part. After learning that they were stolen the defendant took no steps to inform the plaintiff or the police and made no efforts to recover them, and the plaintiff

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(t) *Martin v. L. C. C.*, [1947] K. B. 628; [1947] L. J. R. 1231.

(u) *Rutter v. Palmer*, [1922] 2 K. B. 87; 91 L. J. K. B. 657; *Orchard v. Connaught Club*, [1930] W. N. 88; 46 T. L. R. 214; *Ashby v. Tolhurst*, [1937] 2 K. B. 242.

(w) As to agency of necessity, see the two cases of *Sachs v. Miklos*, [1948] 2 K. B. 23, and *Munro v. Wilmot*, [1948] 2 All E. R. 983.

(x) *Coldman v. Hill*, [1919] 1 K. B., at pp. 452, 456.

did not hear of their loss until three weeks after the theft. The defendant was sued in detinue and for negligence. *Held*, (i) that he was not liable in detinue since the cows were stolen without any fault on his part, but (ii) that he had been guilty of negligence and that the burden lay upon him of showing that the loss was not due to that negligence.

In any action brought by a bailor against a bailee the latter is, as a general rule, estopped or precluded from denying the title of the former or setting up any title in himself or in a third party. But the bailee may show that the title of the bailor has determined since the bailment; so also he may set up a *jus tertii* if he has been evicted by title paramount or if he defends his possession upon the right and title and by the authority of the tertius (y). But he cannot set up the title of another if he accepted the goods with the knowledge of the adverse claim (z).

**Gratuitous bailment.**—*Commodatum* is a gratuitous loan for the benefit of the bailee. It is a loan of something to be returned in *specie*, and does not, therefore, include a loan of money (*mutuum*) in which the *property* in the money passes to the borrower, who is not bound to restore the identical coins, but an equivalent amount (a).

*Depositum* and *mandatum* are alike in two respects, namely (i) that they are for the benefit of the bailor; and (ii) that they are gratuitous, so that the bailee is to have no reward.

If a person who has promised to undertake a gratuitous bailment entirely fails to do so, no action will lie against him for breach of his promise, as such an action would be an action for breach of contract and could not be supported in the absence of consideration; but if he actually enters upon the bailment, as by accepting a deposit of goods, or commencing to perform a service, he is liable for any damages caused to the bailor by his default or negligence during the continuance of the bailment, such an action being an action of tort, to which the doctrine of consideration does not apply (b). “If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects

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(y) *Biddle v. Bond*, 6 B. & S. 225; 34 L. J. Q. B. 137; *Rogers v. Lambert*, [1891] 1 Q. B. 818; 60 L. J. Q. B. 187.

(z) *Ex p. Davies, re Sadler*, 19 Ch. D. 86; 45 L. T. 632.

(a) See *R. v. Burgon*, Dears. & B. 11; 25 L. J. M. C. 105.

(b) *Bullen & Leake* (10th ed.), p. 298, and see *Elsee v. Gatward*, 5 T. R. 4, 148; *Balfe v. West*, 13 C. B., at p. 472; 22 L. J. C. P. 175. As to the liability of bailees for negligence, see also Vol. 1, p. 336.

to perform it. Such is the result of the decision in *Coggs v. Bernard*” (c).

In all gratuitous bailments the bailor is responsible to the bailee for injuries caused to the latter through defects in the chattel of which he is aware; as, for instance, if he lends to the bailee a vicious and unmanageable horse without disclosing its dangerous qualities, and the bailee is in consequence injured (d).

**Bailment for valuable consideration.**—The remaining bailments are alike in that they are for valuable consideration and for the benefit of both bailor and bailee, and that the rights and liabilities of the parties are usually governed by express contract.

Apart from any express contract (e) the bailee, in *locatio rei*, is under the same liability for default or negligence as in the preceding cases of bailment (f). His obligation is to exercise the same care in regard to the property which he is holding as bailee as a reasonably careful person would in regard to his own property (g). The bailor, however, is subject to a higher obligation with regard to defects in the chattel let out to hire; it is not sufficient for him merely to disclose such defects; his obligation is to supply a chattel as fit for the purpose for which it is hired as reasonable care and skill can render it (h).

The bailment of *vadium* will be dealt with in the next chapter. There remains, therefore, only the bailment of *locatio operis faciendi*. In this case, as in the first three cases, if the bailor is aware that the chattel bailed is of a dangerous character he is bound to give notice to the bailee, and is responsible for his omission to do so (i). The liability of the bailee varies according as he is a private person or a person exercising a public employment. A private person, like other bailees, is liable for loss of, or damage

(c) *Skelton v. London and North Western Ry.*, L. R. 2 C. P., at p. 686; 86 L. J. C. P. 49. The student must note that *Coggs v. Bernard* (2 Ld. Raym. 990) was an action of tort (see *Corbett v. Packington*, 6 B. & C., at p. 272; 5 L. J. K. B. 142), and must also distinguish the present statement in the text from the rule in *Bainbridge v. Farmstone*, 8 Ad. & El. 743 (Vol. 1, p. 42), namely, that the parting with the possession of goods is sufficient consideration to support an express promise by the bailee to re-deliver the goods.

(d) See *Blakemore v. Bristol and Exeter Ry.*, 8 E. & B. 1085; 27 L. J. Q. B. 167; *Coughlin v. Gillison*, [1899] 1 Q. B. 145; 68 L. J. Q. B. 147.

(e) See *Rutter v. Palmer*, [1922] 2 K. B. 87; 91 L. J. K. B. 657.

(f) As to hire and hire-purchase, see Chapter IV, Section 2, *post*, p. 677.

(g) *Gutter v. Tait* (1947), 177 L. T. 1, C. A.

(h) *Hyman v. Nye*, 6 Q. B. D., at p. 687; *Reed v. Dean*, [1948] 1 K. B. 188; 64 T. L. R. 621.

(i) *Farrant v. Barnes*, 11 C. B. (N.S.) 558; 31 L. J. P. 187; 132 R. R. 167.

to, the goods only where it is caused by his default or negligence (k); but a person exercising a public employment for reward is an insurer of the goods entrusted to him, and, subject to certain limitations to be mentioned hereafter, his liability does not depend upon default or negligence on his part. Persons so liable as exercising a public employment are innkeepers and common carriers.

## SECTION 2.—*Innkeepers*

**Innkeepers.**—An inn is a house the owner of which holds out that he will receive all “travellers and sojourners” who are willing to pay a price adequate to the accommodation provided, and who come in a condition in which they are fit to be received (l). He is bound to provide “lodging and entertainment” at a reasonable price (m), provided that his house is not full and that either the price of the guest’s entertainment is tendered to him or such circumstances occur as will dispense with that tender (n). An innkeeper may not refuse to supply a traveller with food and lodging without a reasonable (*i.e.*, lawful), excuse. What is a reasonable excuse is a question of fact. An innkeeper is not bound as a matter of law, if he has no food in the house, to send out to procure it. Even if he has food in the house, the obligation to supply it to the traveller is not absolute. The innkeeper may reasonably have regard to the requirements of travellers who may come later in the day, of persons staying at the inn, of his family and servants, and to the provision of meals which must be served before fresh supplies are obtainable. There is no reason why an innkeeper should not book tables in his restaurant, though it may be that he is not entitled to arrange matters so that he supplies meals to residents in his town, with the result that he cannot offer refreshment to *bona fide* travellers (o). For any unreasonable refusal on his part an action (p) or indictment (q) lies against him. In any such action no proof of special damage is necessary (r).

(k) *Collett v. National Fur Co*, 78 Ll. L. Rep. 1, C. A.

(l) *Thompson v. Lacy*, 3 B. and Ald., at p. 285. Approved in *Orchard v. Bush*, [1898] 2 Q. B. 284; 67 L. J. Q. B. 150.

(m) *Thompson v. Lacy* (*ubi supra*).

(n) *R. v. Ivens*, 7 C. & P., at p. 219. As to when an inn is full, see *Brown v. Brandt*, [1902] 1 K. B. 696; 71 L. J. K. B. 367.

(o) *R. v. Higgins*, 68 T. L. R. 578; [1947] 2 All E. R. 619, D. C.

(p) *Hawthorn v. Hammond*, 1 C. & K. 404; and see *Fell v. Knight*, 8 M. & W. 269; 10 L. J. Ex. 277; *Constantino v. Imperial London Hotels*, 60 T. L. R. 510.

(q) *R. v. Ivens* (*ubi supra*); and see *R. v. Rymer*, 2 Q. B. D. 136; 46 L. J. M. C. 168.

(r) *Constantino v. Imperial London Hotels, Ltd.*, (*supra*).



At Common Law an innkeeper has a lien on the goods of his guests and the goods of their visitors, and, on the other hand, he is *prima facie* responsible for all loss of their goods and the goods of their visitors (s).

In order to create the above rights and liabilities (i) the house must be an inn; and (ii) the guest must be a traveller (t); and (iii) the goods must be in the inn.

i. The house must be an inn, offered to the use of the public as such (u). A lodging-house or a boarding-house is not an inn, nor is a residential hotel (v) and the proprietor of such an establishment is only liable for negligence (a). Nor is a restaurant an inn (b), nor a refreshment bar which, though under the same roof as an inn, carries on a separate business and has a separate entrance (c).

ii. The guest must be a "traveller or sojourner"; but it is not necessary that he should have come for more than a temporary refreshment (d). A guest is a person who uses the inn in order to take what it can give; he need not stay the night; it is sufficient if he uses the inn as an inn for the purpose merely of getting a meal there (e), or if he is given a room for washing and dressing and his luggage is taken there for that purpose (f). But a person who makes a special contract with an innkeeper for board and lodging is not a traveller (g). And even a person who has been received as a traveller does not necessarily retain that character for an indefinite time, and may become a boarder or lodger. Whether this is the case is a question of fact, and one of the ingredients for

(s) *Cryan v. Hotel Rembrandt, Ltd.*, 133 L. T. 395; 41 T. L. R. 287.

(t) *Calye's Case*, 8 Coke 32; *R. v. Rymer*, 2 Q. B. D., at p. 139; 46 L. J. M. C. 168.

(u) *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B., at p. 19; 60 L. J. Q. B. 209.

(v) *Olley v. Marlborough Court*, [1949] 1 All E. R. 127, C. A. (applying *Scarborough v. Cosgrove*, *infra*).

(a) *Scarborough v. Cosgrove*, [1905] 2 K. B. 805; 74 L. J. K. B. 892; following *Dansey v. Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 117.

(b) *Ültzen v. Nicholls*, [1894] 1 Q. B. 92; 63 L. J. Q. B. 289.

(c) *R. v. Rymer* (*ubi supra*). This and the preceding case were affirmed and distinguished in *Orchard v. Bush* (*infra*), where the plaintiff had a meal in a dining-room which was part of the inn. It may be noted that the landlord of a fully licensed house, if it is not in fact an inn, is under no legal obligation to supply reasonable refreshment to all comers, and has a Common Law right (apart from s. 80 of the Licensing (Consolidation) Act, 1910) to require a person who is not a traveller to leave the house and, on refusal, to eject him: *Sealey v. Tandy*, [1902] 1 K. B. 296; 71 L. J. K. B. 41.

(d) *Calye's Case*, 8 Coke 32.

(e) *Orchard v. Bush*, [1898] 2 Q. B. 284; 67 L. J. Q. B. 150.

(f) *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209.

(g) *Thompson v. Iacy*, 3 B. & Ald. 283; *Dansey v. Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 117.

determining it is the length of time that has elapsed since his arrival : if he has lost the character of traveller, the innkeeper is entitled to give him reasonable notice to leave (h). And whenever, after the relationship of innkeeper and guest has come to an end, the goods of the guest remain in the inn, the innkeeper, in the absence of any express contract, is liable only for any loss of, or damage to, them which is caused by his default or negligence ; whether or not the relationship has come to an end is a question of fact.

Thus, in *Portman v. Griffin* (i), the plaintiff, who had been staying at the defendant's hotel, paid his bill and went away, leaving his luggage, for which he said he would call in about four hours. Held, that there was evidence upon which it could be found that the relationship of innkeeper and guest had come to an end when the plaintiff went away.

iii. The goods must be in the inn or in some place that is used by the innkeeper as part of the inn. Thus, where an innkeeper placed the carriage of a guest in a part of the open street which he was accustomed to use for the carriages of guests it was held that he continued liable as an innkeeper for its safe custody because by his conduct he had treated the place as part of the inn (k). But he would not be liable if goods were by the direction of the guest placed outside the inn, e.g., if a horse was so sent to pasture (l).

The innkeeper is not, however, liable if he can show (m) :

- (i) that the loss arose from the act of God or the King's enemies (n) ;
- (ii) that the guest retained control of the goods in such a way that he relieved the innkeeper from his duty to take care of them, as, e.g., where a guest has *exclusive possession* of a room which he uses as a warehouse or place for exhibiting goods and of which he alone has the key (o) ;

(h) *Lamond v. Richard*, [1897] 2 Q. B. 541; 66 L. J. Q. B. 315.

(i) 29 T. L. R. 225.

(k) *Jones v. Tyler*, 1 Ad. & El. 522; cp. *Aria v. Bridge House Hotel*, 187 L. T. 299.

(l) *Calys's Case*, 8 Coke 32.

(m) *Thompson v. Lacy*, (*ubi supra*) ; *Richmond v. Smith*, 8 B. & C. 9; 6 L. J. K. B. 279; 32 R. R. 326; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. at p. 21; 60 L. J. Q. B. 209; *Winkworth v. Raven*, [1931] 1 K. B. 652; 11 L. J. K. B. 206; *Carpenter v. Haymarket Hotel, Ltd.*, [1931] 1 K. B. 31; 100 L. J. K. B. 33.

(n) See *post*, p. 597.

(o) *Farnworth v. Packwood*, 1 Stark. 249; *Burgess v. Glen*.

- (iii) that the loss was occasioned by the negligence of the guest. What is negligence is in each case a question of fact (p). In particular it is not necessarily negligence for a guest to leave the door of his bedroom unlocked or unbolted, but it may, in certain circumstances, be evidence of negligence, "for instance if there were races in the neighbourhood, which caused a great number of suspicious characters to be about the inn" (q).

And where a guest is furnished with a key and is warned by notices in his room to lock his door and to leave his valuables at the office there is evidence of negligence if he leaves exposed in his room an open dressing-case containing valuable articles and does not lock his door (r).

In the case of *Carpenter v. Haymarket Hotel* (s) both of the two last-mentioned defences were raised without success.

In this case, the innkeeper, in addition to a notice under the Innkeepers Act, 1868, exhibited in the bedrooms a notice containing the words: "The company will not be responsible for any property lost in the hotel. . . . All articles of value should be deposited in the office." The plaintiff was away at a dance from 9 p.m. to 2.30 a.m. She had left in her room, in a jewel-case placed inside a suitcase that was latched, but not locked, a ring valued at £45. She had locked the door of her room and handed in the key at the hotel office, from which she got it on her return. The next morning, between 8 and 9 a.m., she found that the ring was missing, and brought an action against the defendant company claiming £80, to which sum her claim was restricted by the Innkeepers Act, 1868 (*post*, p. 598). *Held*, that the fact that she did not deposit the ring in the office was no evidence that she had retained the protection of it herself to the exclusion of the innkeeper's liability, and that there was evidence to support the finding of the County Court Judge that the loss of the ring was not due to any negligence on her part.

Similarly in *Shacklock v. Ethorpe* (t), the plaintiff placed her jewels in a jewel-case which she locked. She then placed the jewel-case in a dressing-case provided with three locks, which

(p) *Gee, Walker and Slater v. Friary Hotel (Derby)*, 66 T. L. R. 59.

(q) *Oppenheim v. White Lion Hotel Co.*, L. R. 6 P. C., at p. 520; 40 L. J. C. P. 81. So also if the guest has exhibited money in the public room of a large hotel the fact that he does not lock his door may be evidence of negligence.

(r) *Medawar v. Grand Hotel Co.* (*ubi supra*). See also *Jones v. Jackson*

L. T. 899; *Wright v. Embassy Hotel*, 79 Sol. Jo. 12.

(s) *11 K. B. 364*; 100 L. T. K. B. 88.

(t) 65 T. L. R. 895.

she locked. She left the case in her bedroom but did not lock the door. She was absent from the hotel some hours. *Held*, that these facts were not sufficient evidence to prove that she had failed to take the ordinary care which a prudent person would take (u).

Moreover, in the case of *injury* to the goods of the guest, as distinct from their loss, the innkeeper, apart from any express contract, is not liable unless it is due to his default or negligence. He is only bound to supply such accommodation as he possesses and undertakes that it is reasonably fit, but not that it shall protect the goods of the guest from every form of danger. Hence he is not bound to provide accommodation for a carriage or motor car, and, if he supplies a garage which, in ordinary weather, is quite suitable, he is not liable because a motor car is damaged through the freezing of its water through exceptional frost; nor is it the duty of his servant in such a case to draw off the water (a).

The *Innkeepers Act*, 1868.—The Common Law liability of innkeepers was restricted by the *Innkeepers Act*, 1868, which by s. 1 enacts that no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than £80, except

- (1) where the goods are stolen, lost, or injured through the wilful act, neglect, or default of the innkeeper or any person in his employ; or
- (2) where the goods are deposited with him expressly (b) for safe custody, in which latter case he may demand that the goods shall be placed in a sealed box or other receptacle.

If an innkeeper refuses to receive goods for safe custody, or if by his default the guest is unable to so deposit them, he is not to have the benefit of the Act (c); and he must cause at least one *printed* copy of s. 1 to be exhibited in a conspicuous part of the hall or entrance to the inn, and will only be entitled to the benefit of the Act whilst it is so exhibited (d). The copy should be an exact one, and if there is any material omission the innkeeper is not protected (e).

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(u) For a similar case see *Brewster v. Drennan*, [1945] 2 All E. R. 705, C. A.

(a) *Winkworth v. Raven* (*ubi supra*).

(b) See *Whitehouse v. Pickett*, [1908] A. C. 357; 77 L. J. P. C. 89.

(c) *Id.*, s. 2.

(d) *Id.*, s. 8; *Hodgson v. Ford*, 8 T. L. R. 722.

(e) *Smith v. Brown*, 2 Q. B. D. 402, 40 T. L. R. 750.

*Innkeeper's lien and right of sale.*—An innkeeper has no right to detain his guest's person till his bill is paid (*f*), but he has a general (*g*) lien on all goods brought by the guest to the inn, which the innkeeper receives as such, whether personal luggage or not (*h*), notwithstanding that they do not belong to the guest (*i*), and the innkeeper is aware of that fact. Thus, if a commercial traveller brings with him samples of goods, the innkeeper has a right of lien thereon (*k*). So also where a husband and wife come together to an inn and credit is given to the husband, the innkeeper's lien exists on the separate property of the wife (*l*). But there is no lien in respect of goods the property of a third person which to the knowledge of the innkeeper are sent to the guest for a special temporary purpose, *e.g.*, a piano or other article sent on hire (*m*); nor in respect of goods not received as part of the guest's luggage or property. But an innkeeper was held to have a lien upon a ring deposited with him by a guest as security for payment of the bill, in a case where the guest was subsequently convicted of larceny of the ring (*n*). When an innkeeper is entitled to a lien over carriages and horses, such lien is not limited to the charge for the keep of the horses and the care of the carriages, but extends to the whole charges against the guest (*o*). An innkeeper who accepts security does not thereby waive his Common Law lien on the goods of his guest, unless the nature of the security, or the circumstances under which it is given, are inconsistent with the retention of the lien (*p*).

By the *Innkeepers Act*, 1878, an innkeeper, "in addition to his ordinary lien", has the right to sell by public auction any "goods, chattels, carriages, horses, wares, or merchandise" deposited or left with him or in the inn or its stables or other premises appurtenant or belonging thereunto, where the person depositing or leaving them is undebted to him for board or

(*f*) *Tunbolf v. Alford*, 3 M. & W. 248; 7 L. J. Ex. 260.

(*g*) *Mulliner v. Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700.

(*h*) *Threlfall v. Borwick*, L. R. 10 Q. B. 210; 44 L. J. Q. B. 87.

(*i*) Even if the goods were brought without the owner's knowledge (*Robinson v. Walter*, 3 Bulst. 269; *Stirt v. Drungold*, 3 Bulst. 289) or were stolen, if the innkeeper did not know that when he received them: *Johnson v. Hill*, 3 Stark. 172.

(*k*) *Robins v. Gray*, [1895] 2 Q. B. 501; 65 L. J. Q. B. 44. It was held also in this case that the lien extended to samples sent to the traveller after his arrival at the inn.

(*l*) *Gordon v. Silber*, 25 Q. B. D. 491; 59 L. J. Q. B. 507.

(*m*) *Broadwood v. Granara*, 10 Ex. 417; 24 L. J. Ex. 1.

(*n*) *Marsh v. Police Commissioner*, [1944] 2 All E. R. 391, C. A.

(*o*) *Mullner v. Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700.

(*p*) *Angus v. McLachlan*, 28 Ch. D. 351; 52 L. J. Ch. 587.

for the keep and expenses of any horse or other animal left with him or standing at livery in his stables or in fields occupied by him. But no such sale may be made until the goods, etc., have been six weeks in his custody or upon his premises, without such debt having been paid and satisfied; nor until one month after he has advertised the intended sale in one London newspaper and one country newspaper circulating in the district where the goods, etc., were deposited or left.

The liability of an innkeeper for injuries caused to his guest's person has already been mentioned (q).

### SECTION 3.—*Contracts of Carriage*

[*This section must be read subject to the Transport Act, 1947, which establishes the British Transport Commission which is a public authority. As from January 1, 1948, the whole of the principal railway and canal undertakings, e.g., the Southern Railway, Great Western Railway, London Midland and Scottish Railway, the Grand Central Canal, etc., are vested in the Transport Commission. The Commission may delegate its functions to agents called Executives which are also public authorities. There are at present five Executives, the Railway Executive, the Docks and Inland Waterways Executive, the Road Transport Executive, the London Transport Executive and the Hotels Executive.*

Part III of the Act empowers the Commission to acquire any road transport undertaking operating vehicles under "A" or "B" licences for long distance carriage, i.e., over forty miles, of goods for hire or reward.

Part V of the Act deals with the Transport Tribunal and with transport charges and facilities. The Railway Rates Tribunal established under the Railway Act, 1921, is henceforth called the Transport Tribunal (s. 72). Charges schemes dealing with the charges to be made by the Commission for their services are to be prepared and submitted by the Commission to the Tribunal (ss. 76-81).

Notwithstanding the Act the position of the Railway and Road Transport Executive as carriers remains unchanged and is the same as it was before the passing of the Act.]

**Common Carriers.**—A carrier of goods who is not a common carrier is merely subject to the ordinary liabilities of a bailee (r),

(q) *Ante*, p. 381.

(r) *Fagan v. Green and Edwards*, [1926] 1 K. B., at p. 106; 95 L. J. K. B. 863

but a common carrier is, subject to exceptions, an insurer of the goods carried. "A common carrier is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or money of all such persons as think fit to employ him.

"To render a person liable as a common carrier he must exercise the business of carrying as a *public employment*, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation *pro hac vice*" (s). Thus a furniture remover who does not hold himself out as ready to carry for anyone who applies, but before carrying requires to inspect the furniture and makes a special contract as to its carriage, is not a common carrier (t): nor is a person a common carrier if, as incidental to his business, he transports goods for his customers (u).

It is not necessary, in order to render a person a common carrier, that he should profess to carry between fixed termini (a). But if a person professes to carry goods only from one place to another he is not a common carrier to or from intermediate places (b).

A carrier is a common carrier only of such goods as he publicly professes to carry (c), and he is bound to carry all goods of that description which are offered to him for carriage, without imposing any unreasonable conditions, provided that he has sufficient accommodation and reasonable payment is offered, or the sender is ready and willing to pay it, and that the goods are of a proper kind (d), and adequately packed (c), and are not

(s) Macnamara on Carriers by Land (3rd ed.), p. 11; approved in *Watkins v. Cottell*, [1916] 1 K. B., at p. 14; 85 L. J. K. B. 287.

(t) *Ibid.*, and see *Seasfe v. Farrant*, L. R. 10 Ex. 358; 44 L. J. Ex. 231.

(u) *Consolidated, etc., Co. v. Oliver's Wharf*, [1910] 2 K. B. 395; 79 L. J. K. B. 810.

(a) *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 43 L. J. Ex. 216.

(b) *Johnson v. Midland Ry.*, 4 Ex., at p. 373; 18 L. J. Ex. 366.

(c) *Dickson v. Great Northern Ry.*, 18 Q. B. D., at p. 183; 56 L. J. Q. B. 111; *Great Northern Ry. v. L. E. P. Transport and Depository*, [1922] 2 K. B. at p. 752; 91 L. J. K. B. 807.

(d) *Bullen & Leake's Pleadings* (10th ed.), pp. 122, 295, and see *Garton v. Bristol and Exeter Ry.*, 1 B. & S., at p. 162; 30 L. J. Q. B. 273; 124 R. R. 476; *Great Western Ry. v. Sutton*, L. R. 4 H. L., at p. 237; 38 L. J. Ex. 177. Actual tender of payment is not necessary: *Pickford v. Grand Junction Ry.*, 8 M. & W. 372; 10 L. J. Ex. 342.

(e) *Sutcliffe v. Great Western Ry.*, [1910] 1 K. B., at p. 503; 79 L. J. K. B. 437.

tendered to him an unreasonable time before he is ready to start on his journey (f), or for a destination to which he does not profess to carry (g). It is also his duty at Common Law to provide a vehicle or other means of carriage reasonably fit and sufficient to carry the goods, having regard to their nature and the character of the transit, and to load or stow the goods properly, so that they may be safely carried to their destination (h). At the end of the transit, but not before, he has a lien upon the goods for his charges (i).

A common carrier is not, in the absence of a special contract, bound to deliver within any given time, but only within a time which is reasonable in the circumstances of the case, and he is not responsible for delay, so long as it "is attributable to causes beyond his control and he has neither acted negligently nor unreasonably" (k). He is not therefore liable for delay caused by a strike, even of his own servants, unless it resulted from his own unreasonable conduct (l).

In case of delay the carrier becomes an agent of necessity and may sell the goods if (i) a real business necessity exists for the sale, i.e., where the goods are perishing, and (ii) it is commercially impossible to get the owner's instructions as to what is to be done (m).

He is not bound to travel by the shortest route, but only by the route by which he usually travels and professes to go (n).

In the absence of any express stipulation limiting his liability, a common carrier was at Common Law liable for all loss of or injury to the goods carried, except such as arose from the following perils :—

1. The act of God, i.e., "any accident as to which he can show that it is due to natural causes (e.g., exceptionally bad weather) directly and exclusively, without human intervention, and that it could not have been prevented by any amount of

(f) *Garton v. Bristol and Exeter Ry.*, 30 L. J. Q. B., at p. 293.

(g) *Johnson v. Midland Ry.*, 4 Ex. 367; 18 L. J. Ex. 366.

(h) *L. & N.W. Ry. v. Hudson & Sons, Ltd.*, [1920] A. C., at p. 386; 89 L. J. K. B. 323.

(i) *Wiltshire Iron Co. v. Great Western Ry.*, L. R. 6 Q. B. 776; 40 L. J. Q. B. 308. See also *post*, p. 697.

(k) *Hicks v. Raymond and Reid*, [1893] A. C., at p. 33; 62 L. J. Q. B. 98.

(l) *Sims v. Midland Ry.*, [1913] 1 K. B. 103; 82 L. J. K. B. 67.

(m) *Springer v. Great Western Ry.*, [1921] 1 K. B. 257; 89 L. J. K. B. 1010.

(n) *Myers v. L. & S.W. Ry.*, L. R. 5 C. P., at p. 3; 39 L. J. C. P. 57.



foresight and pains and care reasonably to be expected from him" (o).

2. The King's enemies, i.e., the forces of a State with which this country is at war (p), or "such organised and considerable forces as are entitled to the dignified name of rebels as contrasted with mobs or rioters" (q).

8. The inherent vice of the thing carried, i.e., its "inherent unfitness for the carriage contemplated, by reason either of its nature, or condition, or packing" (r). Thus he is not liable—

for injury to a mare carried by sea, caused partly by rough weather and partly by its own fright and struggles (s);

for the escape of a bullock from a railway truck, due entirely to its own unruliness, the truck being in every way proper and reasonably fit for its conveyance (t);

for the escape of a greyhound through a deficiency in the collar and strap supplied by the owner for securing it during its conveyance (u);

for damage to furniture through improper packing (a);

for loss or damage from the ordinary deterioration of fruit in the course of the journey, through its inherent infirmity or nature, or from the ordinary evaporation of liquids, or from the spontaneous combustion of goods (b).

There is an implied warranty that goods delivered for carriage are safe to be carried and this is so irrespective of whether the person delivering the goods to be carried knows of the danger, and irrespective of whether the person to whom they are delivered is under a common law or a statutory duty to carry them. Of course, this implied warranty can have no place where, by the

(o) *Nugent v. Smith*, 1 C. P. D. 428, at p. 444; 45 L. J. C. P. 697.

(p) *Russell v. Niemann*, 17 C. B. (N.S.) 163; 34 L. J. C. P. 10. It does not include pirates (*ibid*).

(q) *Atlantic Mutual Insurance Co. v. King*, [1919] 1 K. B. 307; 88 L. J. K. B. 1001. So, in *Curtis & Sons v. Mathews*, [1919] 1 K. B. 425; 88 L. J. K. B. 529, it was held that loss caused to the plaintiff in consequence of the seizure of buildings in Dublin by rebels and their bombardment by the forces of the Crown was caused by civil strife amounting to warfare.

(r) *Lister v. Lancashire and Yorkshire Ry.*, [1908] 1 K. B. 878; 73 L. J. K. B. 885; *London and North Western Ry. v. Hudson & Sons, Ltd.*, [1920] A. C., at pp. 381, 382, 383, 347; 89 L. J. K. B. 328.

(s) *Nugent v. Smith* (*supra*).

(t) *Blower v. Great Western Ry.*, L. R. 7 C. P. 655; 41 L. J. C. P. 288.

(u) *Richardson v. North Eastern Ry.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60.

(a) *Barbour v. South Eastern Ry.*, 34 L. T. 67. It has been held that the carrier's knowledge at the time of the receipt of the goods that they were insufficiently packed does not preclude him from setting this up as a defence (*Gould v. South Eastern and Chatham Ry.*, [1920] 2 K. B. 186; 89 L. J. K. B. 700); see, however, *London and North Western Ry. v. Hudson*, [1920] A. C., at p. 340, where a contrary opinion was expressed by Lord Atkinson.

(b) *Blower v. Great Western Ry.*, L. R. 7 C. P., at p. 663.

terms of some special contract between the parties, liability for the breach of such warranty is expressly excluded (c). Moreover, where a person delivers to a carrier goods of such a dangerous nature as to require extraordinary care he is bound to give notice of their nature to the carrier, and, in default of so doing, is liable for any damage caused thereby (d).

It must be noticed that these three exceptions only limit the liability, not the duty, of the carrier (e). It is the duty of the carrier to do what he can by reasonable skill and care to avoid all perils, and he is liable if his negligence has brought about the peril (f), or has increased the injury caused by it (g). Moreover, these three exceptions and any special stipulations limiting the liability of the carrier apply only when the contract is being carried out and not when the carrier is doing something which is at variance with the contract; they do not accordingly apply when the goods are carried by a route wholly different from the usual or the stipulated route (h).

A common carrier may, subject to certain statutory exceptions to be noted later, limit his liability by special stipulations. In such a case it is necessary to look at the terms of the particular contract to see whether the carrier has thereby ceased altogether to occupy the position of a common carrier so that he has become merely a bailee for reward, or whether he remains subject to the liability of a common carrier, save so far as it has been expressly varied by the contract (i).

Where a common carrier makes a stipulation limiting his liability for loss or damage, it will not exempt him from liability for loss or damage arising from his negligence, unless the stipulation clearly and expressly exempts him from liability for negligence or its language is so wide as to cover all loss or damage, however originating, as, e.g., if it includes all damage "however caused" or "under any circumstances". Where, however,

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(c) *Burley v. Stepney Corporation*, [1947] 1 All E. R. 507.

(d) *Farrant v. Barnes*, 11 C. B. (N.S.) 558; 31 L. J. C. P. 137; 182 R. R. 667; *Great Northern Ry. v. L. E. P. Transport, etc., Co.*, [1922] 2 K. B. 742; 91 L. J. K. B. 807 (reviewing the authorities).

(e) *Blower v. Great Western Ry.*, L. R. 7 C. P., at p. 668; 41 L. J. C. P. 268.

(f) *Gill v. Manchester Ry.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89 (negligence of a porter in letting a restive cow out of a truck).

(g) *Notara v. Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158.

(h) *Hales v. London & North Western Ry.*, 4 B. & S. 66; 32 L. J. Q. B. 290; *Mallet v. Great Eastern Ry.*, [1899] 1 Q. B. 309; 68 L. J. Q. B. 256; *London and North Western Ry. v. Neilson*, [1922] 2 A. C. 268; 91 L. J. K. B. 680.

(i) *Great Northern Ry. v. L. E. P. Transport, etc., Co.*, [1922] 2 K. B. 742; 91 L. J. K. B. 807 (reviewing the authorities).

such a stipulation is made by a carrier who is *not* a common carrier he is relieved, even if the loss or damage arises from his negligence, because such a stipulation would have no effect unless it protected him from negligence (*k*).

*Duration of liability.*—The liability of a carrier begins as soon as the goods are accepted for transit by him or his authorised agent (*l*).

His liability ends only when the goods have been delivered according to the instructions of the consignor (*m*). The original instructions of the consignor may, however, be varied while the goods are in transit, either by the consignor (*n*), or by the consignee if he is the owner of the goods (*o*).

If the carrier, however, innocently, delivers the goods to the wrong person, he is guilty of a conversion (*p*). But, if he delivers the goods in accordance with the instructions of the consignor, he is not liable if they are delivered to a person who has obtained them by means of a fraud upon the *consignor* and has no title to them (*q*).

Where goods are delivered to a carrier, to be carried partly by him and partly by his sub-contractor (as, *e.g.*, where goods are delivered to a carrier, to be carried partly in his own vehicles and partly in another's), his liability continues until delivery, unless it is limited by contract to that part of the transit during which the goods are carried by him (*r*). But the carrier in whose hands the goods are when the damage or loss occurs may also be sued in contract if the contract of carriage was made for his benefit or by his authority (*s*), and is liable in tort for his own default or negligence (*t*).

(*k*) *Travers, Ltd. v. Cooper*, [1915] 1 K. B. 73; 83 L. J. K. B. 1787; *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B. 560; 90 L. J. K. B. 1353; *Fagan v. Green and Edwards, Ltd.*, [1926] 1 K. B. 102; 95 L. J. K. B. 363; *Turner v. Civil Service Supply Association*, [1926] 1 K. B. 50; 95 L. J. K. B. 111 (reviewing the authorities).

(*l*) *Colepepper v. Good*, 5 C. & P. 380; *Jenkyns v. Southampton, etc., Steam Packet Co.*, [1919] 2 K. B. 135; 88 L. J. K. B. 965.

(*m*) See *Scothorn v. Staffordshire Ry.*, 8 Ex. 341; 22 L. J. Ex. 121.

(*n*) *Id.*

(*o*) *Cork Distilleries Co. v. Great Southern, etc., Ry.*, L. R. 7 H. L. 269.

(*p*) *Bullen & Lwake's Pleadings* (10th ed.), p. 296; and see *Youl v. Harbottle*, Peake N. P. 68; *Heugh v. London and North Western Ry.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48.

(*q*) *McKean v. McIvor*, L. R. 6 Ex. 36; 40 L. J. Ex. 30.

(*r*) *Muschamp v. Lancaster and Preston Ry.*, 8 M. & W. 421; 10 L. J. Ex. 460; *Bristol and Exeter Ry. v. Collins*, 7 H. L. 194; 29 L. J. Ex. 41.

(*s*) *Gill v. Manchester, Sheffield and Lincolnshire Ry.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89.

(*t*) *Hooper v. London and North Western Ry.*, 50 L. J. Q. B. 103; *White v. South Eastern Ry.*, 1 T. L. R. 319.

If the goods are to be fetched by the consignee from the station or office of the carrier the liability as a common carrier lasts only for a reasonable time after the consignee has notice of their arrival, and the carrier is then liable only for default or negligence as a voluntary bailee (u). So also if the consignee cannot be found, or the goods are refused at his address, the liability of the carrier is reduced to that of a voluntary bailee (x).

*Rights of action against a common carrier.*—A common carrier is merely a particular kind of bailee who, in addition to the ordinary liabilities of a bailee, is also subject to liabilities as an insurer.

These liabilities originally arise, independently of contract, from his exercise of a public employment. And they may still so arise, though usually the carriage of goods is also the subject of an express contract.

An action against a common carrier may accordingly be either an action of tort or contract. If it is not based upon any term of an express contract it is an action of tort (y) which may be brought either by the owner or by a bailee of the goods. Thus—

In *Meux v. Great Eastern Ry.* (a), the owner of goods was held to be entitled to sue for damage to them although they were actually delivered to the carrier by his servant.

In *Marshall v. York, etc., Ry.* (b), a servant was held to be entitled to sue for the loss of luggage delivered by him to a railway company although the ticket with which he travelled was taken by his master.

In *Crouch v. Gt. Northern Ry.* (c), the plaintiff was a bailee of packages collected from various customers and made up into one parcel which he sent by a carrier. Held, that as the employer of the carrier, he was entitled to sue the carrier for a breach of his Common Law duty to carry at a reasonable price.

Where, however, the action is based upon a breach by the carrier of an express term in a contract it can be brought only by the person with whom he has contracted, and the ascertainment of that person depends upon the construction of the contract

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(u) *Shepherd v. Bristol and Exeter Ry.*, L. R. 3 Ex. 186; 37 L. J. Ex. 113; *Chapman v. Great Western Ry.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420.

(x) *Stephenson v. Hart*, 4 Bing. 476; *Heugh v. London and North Western Ry.* (ubi supra).

(y) *London and North Western Ry. v. Hudson*, [1920] A. C., at p. 333; 89 L. J. K. B. 323.

(a) [1895] 2 Q. B. 387; 64 L. J. Q. B. 657.

(b) 11 C. B. 655; 21 L. J. C. P. 34.

(c) 11 Ex. 742; 25 L. J. Ex. 137.

and the circumstances of the case (*d*). In most cases the contract is made by the consignor who is *prima facie* the person to sue upon it (*e*). The consignor may, however, contract as agent for the consignee, either expressly or by inference from the circumstances of the case, as, *e.g.*, where the goods are delivered to the carrier at the request of the consignee who is to be answerable for the freight (*f*).

**Limitation of liability by statute.**—By s. 1 of the *Carriers Act*, 1830, which, *except in the case of railways*, applies only to carriers by land, it was enacted that no mail contractor, stage coach proprietor or other common carrier by land for hire shall be liable for any loss of, or injury to, any valuable articles therein named (*g*), contained in any parcel which shall have been delivered at the office or receiving house of such carrier or to his servant, either to be carried for hire or to accompany the person of any passenger, when the value of those articles shall exceed £10; unless, at the time of the delivery of such parcel to be carried, the value and nature of such articles therein contained shall have been declared, and an increased rate of charge paid, or agreed to be paid. And even when the value of goods has been declared, the carrier is not bound by the declaration, but, in case of its loss or injury, he is entitled to require proof of its actual value, and he is only liable to the extent of its value together with the increased charges paid (*h*).

The scale of increased charges must be legibly notified in a conspicuous part of the office or warehouse, and is then binding without proof of its having come to any customer's knowledge (*i*). Carriers who omit to exhibit such notification or to give a receipt for the increased charge when required are excluded from the

(*d*) *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

(*e*) *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659. See also *Great Western Ry. v. Bagge*, 15 Q. B. D. 625; 54 L. J. Q. B. 599.

(*f*) *Dunlop v. Lambert* (*ubi supra*); *Cork Distilleries Co. v. Gt. Southern, etc., Ry.*, L. R. 7 H. L. 269; *London and North Western Ry. v. Hudson* (*ubi supra*). As to goods sent by a vendor to a purchaser, see also s. 32 of the Sale of Goods Act, 1893, *post*, p. 665.

(*g*) *I.e.*, gold or silver coin, manufactured or unmanufactured gold or silver, precious stones, jewellery, watches, clocks or timepieces, trinkets, bills, notes of any bank in Great Britain or Ireland, orders, notes or securities for payment of money (English or foreign), stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks, furs, or lace, or any of them. Machine-made lace was, however, excluded from the Act by the Carriers Act Amendment Act, 1865.

(*h*) Ss. 7 and 9. In the case of goods consigned to a purchaser the value to the consignor is the invoice price: *Blanchensee v. London and North Western Ry.*, 45 L. T. 761.

(*i*) S. 2

benefit of the Act, and are liable to refund the increased charge (k).

The result of the Act (l) is that the first step necessary to make the carrier liable is the declaration by the sender. *In the absence of such a declaration* he does not lose the protection of the Act merely because he has not made the required notification of the extra charge. If that notification has been made he may make the extra charge. If, after the sender has made the required declaration, the carrier does not demand the increased charge or require it to be paid or promised he retains his Common Law liability. And he also loses the protection of the Act if he fails to give a receipt for the increased charge.

By the Railways Act, 1921 (m), it was provided that, in the case of railways, silk is to be excluded from the articles specified in the Carriers Act, 1880, and £25 is to be substituted for £10. In the case of railways a new section is also added to the Carriers Act, 1880, [as s. 11 of that Act] providing that the expression "common carrier by land" shall include a common carrier by land who is also a carrier by water, and that, as regards every such common carrier, the Act of 1880 shall apply to carriage by water in the same manner as it applies to carriage by land.

The protection given by the Act applies not only to loss of the goods but to all damages consequential on any loss, whether temporary or permanent (n), even though the loss is due to negligence, and even though through negligence the goods have been put out short of the station for which they were destined or carried beyond it (o).

But it does not apply to protect a carrier from liability for delay in delivering the goods not caused by loss, or delay in delivering goods recovered after a temporary loss (p). Nor does it protect him from any wilful misfeasance, such as wilful damage to or wilful conversion of the goods (q). Nor does it apply to protect him from liability for loss or injury arising from the

(k) S. 8.

(l) See *Hart v. Bazendale*, 6 Ex. 769; 21 L. J. Ex. 123; *Great Northern Ry. v. Behrens*, 7 H. & N. 950; 81 L. J. Ex. 299.

(m) Railways Act, 1921, s. 56 and Sixth Schedule.

(n) *Millen v. Brasch*, 10 Q. B. D. 142; 52 L. J. Q. B. 127.

(o) *Morritt v. North Eastern Ry.*, 1 Q. B. D. 302; 45 L. J. Q. B. 289.

(p) *Hearn v. London and South Western Ry.*, 10 Ex. 798; 24 L. J. Ex. 180. "If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them he will not be liable, but if he keeps them after he has recovered them, the Carriers Act will not protect him from such subsequent breach of duty": *Millen v. Brasch*, 10 Q. B. D., at p. 147.

(q) *Morritt v. North Eastern Ry.*, 1 Q. B. D., at p. 308; see also *Shaw v. Great Western Ry.*, [1894] 1 Q. B., at p. 382.

felonious acts of his servants, or to protect his servants from liability for their own personal neglect or misconduct (r). It applies, in the case of railways, to ordinary personal luggage which the passenger is entitled to have carried free of charge, and, therefore, where such luggage consists of valuable articles within the Act, the railway is protected unless the value is declared and an increased charge is paid (s).

Where goods are carried partly by land and partly by sea the Act protects a carrier, *other than the Railway Executive* (t), only when the goods are lost on land, and the onus is on the carrier to prove that the loss occurred during the land journey (u).

By s. 7 of the *Railway and Canal Traffic Act, 1854*, it was provided that no railway or canal company should be liable for loss or injury to animals beyond the sum of £50 for horses, £15 for neat cattle, and £2 for sheep or pigs, per head, unless a higher value was declared and an increased rate, which must be notified as under the *Carriers Act, 1880*, had been paid or agreed to be paid. *But, under the Railways Act, 1921, the amounts in case of railways are now £100 for horses, £50 for neat cattle and £5 for any other animal (w).*

**Limitation of liability by special contract.**—A common carrier might at Common Law limit his liability by making a special contract with the consignor of goods. Before the *Carriers Act, 1880*, this was often effected by means of conditions publicly exhibited at receiving offices or placed upon tickets and receipts, for it was held that such conditions, if sufficiently brought to the notice of the consignor before he sent the goods, could operate as a special contract limiting the liability of the consignor (x). But by s. 4 of the *Carriers Act, 1880*, it was enacted that no public notice or declaration should have any effect in respect of

(r) S. 8. As to special contracts against such acts, see *post*, p. 606.

(s) *Casswell v. Cheshire Lines Committee*, [1907] 2 K. B. 499; 76 T. J. K. B. 784. A regulation that a certain quantity of luggage will be carried "free of charge" means that the fare is a charge for the conveyance both of the passenger and his luggage: [1907] 2 K. B., at p. 506.

(t) See *ante*, p. 602.

(u) *London and North Western Ry. v. J. P. Ashton & Co.*, [1920] A. C. 84; 88 L. J. K. B. 1157.

(w) *Railways Act, 1921*, s. 56, and Sixth Schedule.

(x) See the opinion of Blackburn, J., in *Peck v. North Staffordshire Ry.*, 10 H. L. C., at p. 491; 82 L. J. Q. B. 241, in which the history of this subject is stated and the previous authorities are reviewed. See also *Wade & Co. v. London and North Western Ry.*, [1921] 1 K. B., at p. 591; 90 L. J. K. B. 593.

any articles other than those specified in the Act, though by s. 6, it was provided that nothing in the Act should affect any special contract made between the carrier and the sender of goods. Accordingly, though after this Act the carrier could not limit his liability by a public notice, he could still do so by any "notice specifically delivered to a particular person to form the basis of a special contract with him" (y), as, for example, by a condition printed on a ticket (z).

A special contract in any such form can still be made by any common carrier, *other than the Railway or Docks and Inland Waterways Executive*.

But, by s. 7 of the *Railway and Canal Traffic Act, 1854*, it is provided that every railway or canal company (a) shall be liable for the loss of or injury done to any animals or goods, in the receiving, forwarding, or delivering thereof, occasioned by the *neglect or default* of the company or its servants, and that any notice or condition to the contrary shall be absolutely void, provided, however, that nothing shall alter or affect the rights, privileges, or liabilities of any such company under the Carriers Act, 1880, with respect to articles of the description mentioned in that Act.

The section, however, also provides that nothing therein contained is to prevent a railway or canal company from making such conditions with respect to the receiving, forwarding, and delivering of animals or goods as shall be adjudged by the Court or Judge to be just and reasonable, and that no *special contract* with such a company as to the receiving, forwarding, or delivering of any animals or goods shall be binding upon anyone unless signed by him or the person delivering the animals or goods for carriage.

All the words of this section must be read together, and, therefore, the conditions there spoken of must not only be just and reasonable, but must be embodied in a special contract in writing, signed by the owner or sender of the goods (b). The

(y) *Walk v. York and North Midland Ry.*, 2 E. & B., at p. 761; and see *Peck v. North Staffordshire Ry.*, 10 H. L. C., at p. 507.

(z) See cases cited in 10 H. L., at pp. 499-505.

(a) "Hereafter, where the words 'railway company' or 'canal company' appear the provisions of the Transport Act, 1947, should be borne in mind (*ante*, p. 595).

(b) *Peck v. North Staffordshire Ry.*, 10 H. L. C. 443; 32 L. J. Q. B. 241. The form and signature of the contract are governed by the same rules as those applicable to contracts within the Statute of Frauds. Thus, the signed contract need not be on one document but the conditions must either be set out in the document that is signed or must be incorporated with that document by direct



question as to what constitutes a reasonable condition is a question of fact for the Judge, depending on the circumstances of each case; and the burden of proving that the condition is reasonable rests upon the railway company alleging or that alleges it (c). Thus, in cases before the Railways Act, 1921, if a consignor had a fair alternative between sending at "company's risk" for a reasonable sum, or sending at "owner's risk" for a smaller sum, and chose the latter, a condition against liability, except for wilful default or neglect, was usually held to be reasonable (d).

*But, in the case of railway companies, the standard terms and conditions, as settled under the Railways Act, 1921, shall be deemed reasonable (e).*

The words "neglect or default" in the earlier part of the section extend only to negligence or default in the nature of negligence or within the scope of the servant's employment; they do not include theft by a servant without any negligence on the part of the company, and, therefore, subject in case of the valuables specified in the Act of 1880 to the provisions of s. 8 of that statute (f), a railway company can at Common Law make a special contract exempting itself from liability for such theft; and the contract, not being within the Act of 1854, need not be just and reasonable as required by that Act (g).

The Act applies where a railway company is in fact carrying goods under a contract although under no obligation to do so.

Thus, in *Wilkinson v. Lancashire and Yorkshire Ry.* (h), the defendant company by its time-tables offered to allow commercial travellers to take free from charge, but subject to special conditions, a certain amount of luggage which was not ordinary passengers' luggage. *Held*, that in the absence of a special contract signed by the person taking such luggage, those conditions were void.

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reference; there is, also, a sufficient signature if the name of the owner or sender is printed or stamped at the top or on the body of the contract, provided that it is placed there by him to give authority to the document as coming from him: *Wade & Co. v. London and South Western Ry.* (*ubi supra*).

(c) *Peek v. North Staffordshire Ry.* (*ubi supra*); *Manchester, Sheffield and Lincolnshire Ry. v. Brown*, 8 App. Cas., at p. 716; 53 L. J. Q. B. 124; *Great Western Ry. v. McCarthy*, 12 App. Cas. 218; 56 L. J. P. C. 33.

(d) *Manchester, etc., Ry. v. Brown* (*ubi supra*); *Great Western Ry. v. McCarthy* (*ubi supra*). But a condition against all liability is unreasonable (*Peek v. North Staffordshire Ry.* (*ubi supra*); *Ashenden v. London, Brighton and South Coast Ry.*, 5 Ex. D. 90). As to when different rates offered a fair alternative, compare *Dickson v. Great Northern Ry.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111, with *Williams v. Midland Ry.*, [1908] 1 K. B. 252; 77 L. J. K. B. 157.

(e) Railways Act, 1921, s. 43.

(f) *Ante*, p. 604.

(g) *Shaw v. Great Western Ry.*, [1894] 1 Q. B. 373.

(h) [1907] 2 K. B. 222; 76 L. J. K. B. 801.

The Act itself does not apply to contracts made by railway companies exempting themselves from liability for loss or detention occurring beyond their own lines (i). Provisions similar to those of the Act were, however, usually contained in all railway special Acts, and by s. 81 of the Railway Clauses Act, 1868, were incorporated in all railway special Acts authorising the use of steam vessels. But by s. 56 of the Railways Act, 1921, all such provisions are no longer of any effect.

**Railway Companies.**—In view of the *Railways Act*, 1921, the position of railway companies as carriers of goods requires separate consideration. By Part I of this Act the railways of Great Britain were amalgamated into groups. By Part II of the Act a new Court of Record was established, styled the Railway Rates Tribunal (now called the *Transport Tribunal* by s. 72 of the Transport Act, 1947 (j)), with powers to determine various questions relating to charges and other matters (k).

As has been stated in the preceding pages, the liability of a railway company as a common carrier can exist only in respect of goods which it professes to carry as such.

But by s. 2 of the *Railway and Canal Traffic Act*, 1854, every railway or canal company is bound to afford reasonable facilities for the receiving, forwarding and delivering of "traffic", i.e., passengers and their luggage, goods, animals, carriages, trucks, boats, and vehicles of every description adapted for running or passing on its railway or canal (l). In respect, however, of traffic not carried by a railway or canal company as a common carrier it was liable only as an ordinary bailee for the neglect or default of its servants, and might further limit its liability by a special contract under s. 7 of the Act (m).

Under the *Railways Act*, 1921, all goods except dangerous goods and passengers' luggage are carried upon Standard Terms and Conditions which were settled by what was formerly the Railway Rates Tribunal. Those terms and conditions are still operative and are—

(i) *Zuns v. South Eastern Ry.*, L. R. 4 Q. B. 589; 38 L. J. Q. B. 209. Apart from such special contract a company is liable, where there is a through booking, to the end of the journey.

(j) *Ante*, p. 595.

(k) *Railways Act*, 1921, ss. 27, 28.

(l) *Id.*, s. 1. These sections have now been extended by the *Railways Act*, 1921, s. 16, and, as regards the conveyance of perishable merchandise, by Provision 10 of the Fifth Schedule.

(m) *Dickson v. Great Northern Ry.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111; *Smith & Sons v. London and North Western Ry.*, 88 L. J. K. B. 742.

- i. the terms and conditions (called in the Act "company's risk conditions") on and subject to which merchandise other than live stock, and live stock, will respectively be carried if carried at ordinary rates;
- ii. the terms and conditions (called in the Act "owner's risk conditions") on and subject to which merchandise other than live stock and, subject to certain provisions of the Act, live stock, will respectively be carried if carried at owner's risk rates;
- iii. The terms and conditions on and subject to which damageable goods not properly protected by packing will be carried (n).

Apart from special contract the terms and conditions upon and subject to which merchandise is carried by a railway company are "company's risk" conditions, and those conditions apply without any special contract in writing to the conveyance of merchandise at ordinary rates; but where an "owner's risk" rate is in operation and the company has been requested in writing to carry at that rate, the terms and conditions upon and subject to which such goods shall be carried shall be "owner's risk" conditions (o).

The terms and conditions settled by the Tribunal are the standard terms and conditions for all railway companies and are to be deemed reasonable (p), but they may be amended by the Tribunal on the application of a railway company or a representative body of traders (q).

Subject, however, to the provisions of the Railway and Canal Traffic Acts, 1854 and 1888, nothing in the Act precludes a company and a trader from agreeing *in writing* to any terms and conditions they think fit for the carriage of merchandise, live stock or damageable goods not properly protected by packing, or dangerous goods (r).

The terms and conditions that have been settled under the Act constitute in fact fourteen distinct forms of contract, which are too lengthy and complicated to be dealt with in this book.

These contracts vary in their contents and in the terms and conditions which they contain according—

- (i) to the nature of the goods carried,

(n) S. 42.

(o) S. 44 (1).

(p) S. 43 (2).

(q) S. 45.

(r) S. 44 (3). As to the Acts of 1854 and 1888, see *ante*, pp. 604, 605.

- (ii) in most cases, to the rates at which they are carried, i.e., company's risk rates or owner's risk rates;
- (iii) in some cases, to the kind of train by which they are carried, i.e., merchandise train, or passenger train or some similar service.

Ordinary merchandise—excluding live stock, dangerous goods and merchandise for which there are special forms of contract, such as damageable goods not properly protected by packing and perishable merchandise—may be carried under four contracts, i.e., either at owner's risk or company's risk and either by merchandise train or by passenger train or some similar service.

In the excluded cases there are sometimes alternative forms of contract but sometimes only one form is provided.

But a railway company is not under any obligation to carry damageable goods not properly protected by packing (s), or dangerous goods (t).

From the coming into operation of the Act, the Carriers Act, 1880, and the Railway and Canal Traffic Act, 1854, have, as already stated, been modified in their application to railway companies.

**Carriage by water.**—It has already been pointed out that the *Carriers Act*, 1880 (as amended by the *Railways Act*, 1921) now applies to carriage by water by a common carrier by land who is also a carrier by water. A railway company carrying goods by water also has the exemptions from liability given by the *Merchant Shipping Act*, 1894 (as amended by subsequent Acts) (u).

But the provisions of s. 7 of the *Railway and Canal Traffic Act*, 1854, no longer apply to goods carried by railway companies by water (x); and by s. 14 of the *Regulation of Railways Act*, 1868, it is provided that, where a company by through-booking

(s) S. 44 (2).

(t) S. 50. If the company accepts dangerous goods they will be conveyed subject to such by-laws and conditions as the company may think fit to make in regard to their conveyance or storage, and the owner or consignor must indemnify the company against all loss or damage resulting from non-compliance therewith, and must pay full compensation for all injury to the company's servants or damage to its property arising therefrom, unless it is proved that such injury or damage is due to the wilful misconduct of the company's servants, but, subject as aforesaid, the provisions of the Act as to ordinary rates and owners' rates apply; any question as to whether goods are dangerous is to be determined by the Transport Tribunal, but, when a railway company has declared any article dangerous, it is for the person requiring it to be carried to show that it is not dangerous (*ibid.*).

(u) *Post*, p. 628.

(x) *Railways Act*, 1921, s. 56, and Sixth Schedule; see *ante*.

contracts to carry animals, luggage or goods, partly by rail or canal and partly by sea, a condition exempting it from liability for any loss or damage arising by sea, from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all other dangers or accidents of the seas, rivers, and navigation shall, if published in a conspicuous manner in the office where the booking is effected and printed legibly on the receipt or freight note, be valid as part of the contract between the consignor and the company.

But, both as regards limitation of liability and the right to make special conditions, the *Carriage of Goods by Sea Act, 1924*, applies to the carriage of goods by sea by railway companies where the contract of carriage is covered by a bill of lading or any similar document of title (y).

**Standard charges.**—By the *Railway Clauses Act, 1845*, and the *Railway and Canal Traffic Acts, 1854 and 1888*, and other statutes, a railway company was, before the *Act of 1921*, bound to make equal charges to all persons in respect of the carriage of goods and to give no undue preference to any particular persons or descriptions of traffic.

Under the *Railways Act, 1921*, schedules of standard charges have been fixed by the Tribunal, and, except by way of an exceptional rate, continued, granted, or fixed under the provisions of the Act, no variation either upwards or downwards may be made from these authorised charges, which may, however, in certain circumstances be modified by the Tribunal (z). As from the "appointed day" all statutory provisions and the provisions of all agreements with respect to the classification of merchandise and charges for its carriage have with some exceptions been repealed and ceased to be operative (a).

**Passengers' luggage.**—By s. 28 (1) (h) of the *Railways Act, 1921*, the Tribunal has power to determine any question as to "the articles and things that may be conveyed as passengers' luggage". Passengers paying the standard fare are allowed to take with them free of charge a certain amount of ordinary luggage, not being merchandise or other articles carried for hire or

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(y) The Act does not, however, apply to the coasting trade, live stock and cargo which by the contract of carriage is stated as being carried on deck and is so carried (*post*, p. 630). In certain cases, moreover, it is possible to contract out of the Act (*post*, p. 633).

(z) Ss. 32-35, and, as to exceptional charges, ss. 36-40, and, as to through charges, s. 47. As amended by s. 73 of the *Transport Act, 1947*.

(a) S. 34.

profit, or luggage registered to or from places outside Great Britain (b).

All passengers' luggage, whether carried free or not, and whether ordinary luggage or not, is, apart from special contract, carried by railway companies on the appropriate company's risk conditions (c), which provide that subject thereto the rights and liabilities of the passenger and of the company respectively, whether at common law or under any statute, remain unaffected. Passengers' luggage is, accordingly, carried by railway companies as common carriers, subject to the *Carriers Act*, 1880 (as modified by the *Railways Act*, 1921) (d), and (when carried by land) to s. 7 of the *Railway and Canal Traffic Act*, 1854 (e), and to the exemptions from liability under the *Merchant Shipping Act*, 1894 (as amended by subsequent Acts) (f).

Their liability as such exists from the time when it is delivered to them for the purposes of the journey until the time when it is re-delivered by them to the passenger at the termination of the journey; if, however, at the instance or request of the passenger the luggage is not put into the van, but into a carriage, the railway company is not liable for any loss or injury occasioned by the passenger's own negligence while the luggage is within his control and out of the exclusive control of the company (g). But the company is not relieved from liability merely because the luggage is not in the carriage in which the passenger is travelling, as, for instance, if it is placed in the corridor of the train, or if the passenger as "an ordinary incident of railway travel" goes to some other carriage, e.g., in order to smoke or take a meal (h).

(b) See Part VII of the Schedule of Standard Charges settled by the Railway Rates Tribunal. As amended by s. 78 of the *Transport Act*, 1947.

(c) This follows from the generality of s. 44 (1) of the *Railways Act*, 1921. Formerly there was no obligation on railway companies to carry other than personal luggage belonging to a passenger. They were bound to carry a certain weight free but could charge for any excess. They were entitled to carry merchandise for a passenger but not obliged to do so. If a passenger included in his luggage articles other than his personal belongings, they were carried at the passenger's risk (*Cahill v. L. & N. W. Ry.*, 13 C. B. (N.S.) 818; 31 L. J. P. C. 21; *Belfast and Ballymena Ry. v. Keys*, 9 H. L. C. 556).

(d) *Ante*, pp. 602, 603.

(e) *Cohen v. South Eastern Ry.*, 2 Ex. D. 258; 46 L. J. Bx. 417.

(f) *Post*, p. 628; and see *The Stella*, [1900] P. 161; 69 L. J. P. 70. The *Carriage of Goods by Sea Act*, 1924, does not apply to passengers' luggage.

(g) *Great Western Ry. v. Bunch*, 13 App. Cas. 31; 57 L. J. Q. B. 361; reviewing the earlier authorities and affirming *Richards v. London, Brighton and South Coast Ry.*, 7 C. B. 839; 18 L. J. C. P. 251; 78 R. R. 840; and *Talley v. Great Western Ry.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9.

(h) *Vosper v. Great Western Ry.*, [1928] 1 K. B. 840; 97 L. J. K. B. 51. The onus of proving negligence on the part of the passenger is on the railway company and might be discharged if "the passenger on a long journey had left

The liability of the railway company as a common carrier does not attach to luggage delivered for deposit or future transit, but only to luggage received for present transit, *i.e.*, received a reasonable time before the departure of the train, so that it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail and not merely waiting to begin its prosecution at some future time (i).

At the end of the journey it is the duty of the railway company to have the luggage ready for delivery upon the platform, and it is the owner's duty to call for it and remove it within a reasonable time; and if he does not take it away within a reasonable time the liability of the company is at an end (k). Failure on the part of the railway company to have someone in control of the luggage is negligence and if thereby luggage is lost the company will be liable in damages in the absence of a contract in writing excluding liability (l). If the company employs porters to carry the luggage from the platform to the cart or other vehicle in which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (m). If luggage is left in the custody of a porter under such circumstances as to make the porter the agent of the passenger the company is under no liability. Thus, where a passenger, having missed his train, left his luggage on the platform in the charge of a porter, saying that he would travel by the next train, which went in an hour, and in the interval went to an hotel, it was held that the company was not liable for its loss during his absence (n). So also, where a passenger having at the end of the journey received her luggage from the company, entrusted it to a porter to take care of until she could send for it, the company was held not to be liable for its loss (o).

Passengers' luggage (p) consists of "whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs,

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his luggage in a place where there were many other passengers about, paying no attention to it and travelling in a different carriage"; but the question is, in each case, one of fact: [1928] 1 K. B., at p. 350.

(i) *Great Western Ry. v. Bunch*, 13 App. Cas., at pp. 41, 45.

(k) *Patscheider v. Great Western Ry.*, 5 Ex. D. 153.

(l) *Page v. L. M. S. Ry.*, [1948] 1 All E. R. 455.

(m) *Richards v. London, Brighton and South Coast Ry.*, 7 C. B. 839. See also *Butcher v. London and South Western Ry.*, 16 C. B. 13.

(n) *Welsh v. London and North Western Ry.*, 34 W. R. 166.

(o) *Hodkinson v. London and North Western Ry.*, 14 Q. B. D. 228; 33 W. R. 622.

(p) The question whether articles do or do not constitute passengers' luggage is, having regard to the terms on which it is now carried, not of the same importance as formerly. See *ante*, pp. 610, 611.

either with reference to his immediate necessities, or to the ultimate purpose of the journey" . . . . "This would include, not only all articles of apparel whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act . . .—but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his travelling" (q).

If articles are deposited in the cloak-room of a railway company the liability of a company is merely that of a bailee (r), subject to any special contract limiting their liability (s); and any such special contract is not void merely because the conditions are unreasonable, though it may be void if the conditions are so extravagant as to imply that the assent of the depositor has been obtained by fraud, or so irrelevant as to be entirely foreign to the contract (t).

By s. 11 of the *Transport Act*, 1947, all actions (u) against the Transport Commission or an Executive must be brought within three years from the date when the cause of action accrued.

#### SECTION 4.—*Contracts of Affreightment*

Contracts of affreightment are contracts for the carriage of goods by sea for a reward termed *freight*. Such a contract is usually, but not necessarily, in one of two following forms:—

1. It may be made between a shipowner and a person who hires the ship or some principal part of the ship for the conveyance of goods on a specific voyage or for a specified time. In this

(q) *Macrow v. Great Western Ry.*, L. R. 6 Q. B., at p. 621; 40 L. J. Q. B. 300; cited and approved in *Casswell v. Cheshire Lines Committ e*, [1907] 2 K. B., at p. 504; 76 L. J. K. B. 734. Passengers' luggage does not include a child's toy horse weighing 78 lbs. (*Hudston v. Midland Ry.*, L. R. 4 Q. B. 866; 38 L. J. Q. B. 213), nor a client's title deeds carried by a solicitor (*Phelps v. London and North Western Ry.*, 19 C. B. (N.S.) 321; 34 L. J. C. P. 259), nor bedding brought by an immigrant from Canada for the use of his family when he acquires a home in England (*Macrow v. Great Western Ry.*, *ubi supra*). A bicycle is not "ordinary" luggage within the meaning of a Railway Act allowing "ordinary" luggage of a certain weight to be carried free of charge: *Britten v. Great Northern Ry.*, [1899] 1 Q. B. 243; 68 L. J. Q. B. 75.

(r) See *Harris v. Great Western Ry.*, 1 Q. B. D., at p. 528; 45 L. J. Q. B. 729. The bailment is *locatio operis faciendi*.

(s) See *Van Toll v. South Eastern Ry.*, 12 C. B. (N.S.) 75; 31 L. J. C. P. 241; 133 R. R. 285; *Pratt v. South Eastern Ry.*, [1897] 1 Q. B. 718; 66 L. J. Q. B. 418.

(t) *Gibaud v. Great Eastern Ry.*, [1921] 2 K. B. 427; 90 L. J. K. B. 535.

(u) Save actions on specialties or judgments where the normal period of twelve years applies, or actions to recover penalties when the normal period of two years applies.



case the person hiring the ship is termed the *charterer*, and the contract is contained in a *charterparty*.

2. It may be made between a shipowner or a charterer and one of a number of persons who deliver goods to be carried in the ship. Here the ship is called a *general ship* and the contract is evidenced by a *bill of lading*. But even when a ship is chartered and employed by the charterer only for his own goods it is usual for him to receive a bill of lading, which serves as a receipt for the goods and as a document of title (*w*).

### SUB-SECTION 1.—*Charterparties*

A charterparty may be of two kinds. It may operate as a demise of the ship itself, to which the services of the master and crew may or may not be added, or the charterer may merely acquire the right to have his goods conveyed by the particular vessel and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. "In the first case, the charterer becomes for the time the owner of the vessel, the master and the crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also" (*w*). It is very rarely that a charterparty does amount to a demise of the ship (*y*), and unless otherwise stated the remaining part of this section applies only to the latter kind of charterparty and only to a voyage charter.

*Form of Charterparty.*—The following is a short form of charterparty (*z*).

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(*w*) See *Oriental S.S. Co. v. Tylor*, [1898] 2 Q. B., at p. 521; 63 L. J. Q. B. 128; *Kruger & Co., Ltd. v. Mosl Trypan Ship Co., Ltd.*, [1907] A. C. 272; 76 L. J. K. B. 985. See also the judgment of Sir Gorell Barnes, *ibid.*, [1907] 1 K. B., at p. 815.

(*x*) *Sandeman v. Scurr*, L. R. 2 Q. B., at p. 96; 36 L. J. Q. B. 58. See also *Baumwooll, etc. v. Gilchrist*, [1892] 1 Q. B. 253; affirmed *sub nom. Baumwooll, etc. v. Furness*, [1898] A. C. 8; 62 L. J. Q. B. 201; *Associated, etc., Cement Co. v. Ashton*, [1915] 2 K. B. 1; 84 L. J. K. B. 519.

(*y*) For an example, see *Elliott Steam Tug Co. v. Admiralty Commissioners*, [1921] 1 A. C. 137; 89 L. J. K. B. 977.

(*z*) Many different forms of charterparties are used, and the example in the text is intended merely to show the nature of the contract. Printed forms are employed which are filled up in accordance with the requirements of the particular contract, and, if there is any repugnancy between the written and printed matter, the written matter usually prevails: see *Moore v. Harris*, 1 App. Cas.

*“Charterparty*

(Date.)

“It is this day mutually agreed between Owners  
of the good Ship or Vessel called the of the measure-  
ment of Tons Register, carrying Tons d.w., or  
thereabouts now at and Merchants.

“That the said Ship being tight, staunch, and strong, and every way fitted for the Voyage, shall with all convenient speed sail and proceed to or so near thereunto as she may safely get, and there load from the Agents of the said Charterers in the usual and customary manner a full and complete cargo of which cargo the said Merchants bind themselves to ship not exceeding what she can reasonably stow and carry over and above her tackle, Apparel, Provisions and Furniture, and being so loaded shall therewith proceed to or so near thereunto as she may safely get, and there deliver the same on being paid Freight for the same at the rate of £ per ton of 20 cwt. delivered.

“The Cargo to be brought to and taken from alongside at Merchant’s risk and expense.

“The Act of God, damages and accidents of the sea, rivers and navigation, or land transit, of whatsoever nature or kind, fire at any time and in any place, barratry of the master or crew, enemies, pirates, arrests and restraint of princes, rulers, or people, collision, stranding, straining, and all losses or damages caused thereby, and other accidents of navigation mutually excepted, even when occasioned by negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners. Ship not answerable for losses through explosion, or any latent defect in the hull or tackle not resulting from want of due diligence by the owners of the ship. The ship has liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress and to deviate for the purpose of saving life or property. Ship not to be held responsible for cost of cargo short delivered (if any), notwithstanding the master may have signed a receipt for weight; all cargo taken on board to be delivered, captain or mate making affidavit to this effect if required. Bills of Lading are to be

signed by the Master, if required, without prejudice to this Charterparty (a).

"Sufficient cash to be advanced at port of loading for Ship's disbursements, if required, subject to insurance (b), and the balance of Freight on delivery of Cargo in cash.

"The Cargo to be loaded in Working Days, and to be discharged at the average rate of not less than tons per Working Day,

"(Sundays, Holidays, and Strikes, mutually excepted),

"And all Days on Demurrage, over and above the said Laying Days, at £ per day.

"The Owner or Master to have an absolute lien upon the Cargo for Freight, Dead Freight and Demurrage.

"Penalty for non-performance of this agreement, estimated amount of Freight (c). General average, as per York/Antwerp Rules, 1890".

The discussion and explanation of the terms of a charterparty is beyond the scope of this work, but the following points may be noted:—

Whether any statement or undertaking in a charterparty is a condition or a warranty is a question of construction, in which the Court will be influenced, not only by the language of the instrument, but by the circumstances in which, and the purposes for which, the charterparty was entered into (d). The test is how far the object of the contract depends upon it (e). Thus, in ordinary circumstances, a statement of the ship's position at the date of the charterparty is a condition, as being the datum on which the charterer can found his calculation of the time of the ship's arrival at the port of loading (f); so also a statement that a vessel is to sail or be ready to receive a cargo on or before a

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(a) The effect of this clause is to make it an express term of the contract between the shipowner and the charterer that the master shall have no authority to sign a bill of lading which is in any way inconsistent with the charterparty: see *Kruger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.*, [1907] A. C. 272; 76 L. J. K. B. 985.

(b) That is to say, "as the owner who, in the ordinary course of things would insure the whole freight, will not want to insure so much of that freight as he gets safely into his pocket, he is to make a deduction, when he gets that money into his pocket, of so much as it would have cost him to insure that money": *Smith, Hill & Co. v. Pyman, Bell & Co.*, [1891] 1 Q. B., at p. 46.

(c) This clause is a penalty clause and does not limit the amount which can be recovered under the charterparty as general damages (*Wall v. Rederiaktiebolaget Luggade*, [1915] 3 K. B. 66; 84 L. J. K. B. 1663; *Mitsui & Co., Ltd. v. Watts, Watts & Co., Ltd.*, [1916] 2 K. B. 826; 85 L. J. K. B. 1721; [1917] A. C. 227; 86 L. J. K. B. 873; and see p. 242). It has therefore long been regarded as worthless: [1916] 2 K. B., at p. 851.

(d) *Behn v. Burness*, 3 B. & S., at p. 757; 32 L. J. Q. B. 204.

(e) 3 B. & S., at p. 759; see also p. 225.

(f) *Ibid.*

given day, has been held to be a condition (g); but a stipulation that a ship shall "forthwith" or "with all possible despatch" proceed to the port of loading will be construed as a warranty unless the breach is so serious as to frustrate the object of the contract (h).

It is, however, an implied condition of the charterparty that the ship shall arrive at the port of loading in time for the contemplated voyage, and if the delay is so great as to frustrate the object of the voyage the charterer may throw up the charterparty (i). So also there is an implied condition of seaworthiness (j) (including cargoworthiness), namely, that the ship shall be, at each stage of her contract venture, reasonably fit to encounter the ordinary perils of the sea which she may be expected to encounter (including the ordinary perils of lying afloat in harbour waiting to sail), and also that both the ship and her furniture and equipment are reasonably fit for receiving the contemplated cargo (k). If she is not and cannot within a reasonable time be made seaworthy, the charterer may throw up the charter (l).

The obligation of the charterer to provide the cargo begins as soon as the ship is at the place of loading contemplated by the charterparty, and is ready to receive the goods on board, and the charterer has notice thereof (m). Where the charterers nominate the port or berth of loading or unloading the nomination, once made, is to be treated as written into the charterparty and the charterers will not be allowed to alter it (n).

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(g) 3 B. & S., at p. 754. See also *Bentzen v. Taylor Sons & Co.*, [1898] 2 Q. B. 274; 68 L. J. Q. B. 15. The same effect is produced by the *cancellation clause*, which is frequently contained in charterparties, by which the charterer has the option of cancelling the charter if the ship is not ready to load by a certain date.

(h) *MacAndrew v. Chapple*, L. R. 1 C. P. 643; *Jackson v. Union Marine Insurance Co.*, L. R. 10 C. P. 125; 42 L. J. C. P. 284.

(i) *Jackson v. Union Marine Insurance Co.*, L. R. 10 C. P. 125; 42 L. J. C. P. 284.

(j) As to the costly effects of initial unseaworthiness causing delay in reaching the port of discharge, see *Monarch S.S. Co v. A/B Karlshamns Oljefabriker*, [1949] 1 All E. R. 1, H. L.

(k) *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A. C., at p. 530; 93 L. J. K. B. 625 (reviewing the authorities); *Reed & Co. v. Page, Son & East, Ltd.*, [1927] 1 K. B. 743; 96 L. J. K. B. 390 (explaining what constitutes a stage of the adventure).

(l) *Stanton v. Richardson*, L. R. 9 C. P. 390; 45 L. J. C. P. 78; *Tully v. Howling*, 2 Q. B. D. 182; 46 L. J. Q. B. 388.

(m) *Nelson v. Dahl*, 12 Ch. D., at p. 588; *United States Shipping Board v. Frank Strick & Co.*, [1926] A. C., at p. 558; 95 L. J. K. B. 776.

(n) *Anglo-Danubian Transport Co. v. Ministry of Food*, [1949] 2 All E. R. 1068.

The charterer is under an absolute obligation to provide at the port of loading the cargo specified by the charterparty; and, therefore, subject to any express stipulations and save in the special classes of cases in which impossibility of performance is a defence (o), he is not excused by anything which prevents him from so doing, as, *e.g.*, inability to procure the particular cargo, or adverse weather, or strikes (p). If he fails to provide a "full and complete" cargo (q), he is liable to pay damages for his breach of contract, termed *dead freight* (r).

If no specific time is fixed within which the ship is to be loaded, the charterer must load within a time which is reasonable (s), having regard to the existing circumstances (t) and to any express term of the charterparty, as, *e.g.*, a provision that it shall be loaded "with all possible dispatch" or with the customary dispatch of the port (u).

Usually, however, there is a provision that a fixed number of days, termed *lay days*, shall be allowed for loading and a further stipulation providing for an additional daily payment, known as demurrage, for detention beyond the agreed lay days, this further stipulation either giving the charterer the right to detain the ship for a specified number of days on payment of demurrage or merely providing that demurrage shall be paid at a fixed daily rate after the expiration of the lay days.

Where there is a stipulation for lay days and demurrage the charterer is under an absolute obligation to complete the loading, including stowing (a) within the lay days, and on failure to do so is liable for demurrage and also, if the number of demurrage days is fixed, for damages for the further detention of the ship beyond the demurrage days, even though completion of the loading is rendered impossible without any fault on his part, unless

(o) p. 207.

(p) See *Coverdale v. Grant*, 9 App. Cas. 470; 53 L. J. Q. B. 462; *Ardan S.S. Co. v. Weir*, [1905] A. C. 501; 74 L. J. P. C. 143.

(q) That is to say, a "full and complete cargo" of the thing which was contemplated to be loaded by the charterparty: *Isis S.S. Co. v. Bahr*, [1900] A. C. at p. 344; 69 L. J. Q. B. 660.

(r) *McLean v. Fleming*, L. R. 2 H. L. (Sc.) 128; *Kish v. Taylor*, [1912] A. C. 604; 81 L. J. K. B. 1027.

(s) See *Vergottic v. William Cory & Son, Ltd.*, [1926] 2 K. B., at p. 253; 95 L. J. K. B. 1002.

(t) Thus in this case he may be excused if the delay is due to a strike: *Hick v. Raymond*, [1898] A. C. 22; 62 L. J. Q. B. 98.

(u) *Nelson v. Dahl*, 12 Ch. D., at p. 583.

(a) *Argonaut Navigation Co. v. Ministry of Food*, [1949] 1 K. B. 14; [1948] 1 All E. R. 871: —the task of loading is a joint operation and each party must do what is reasonable to enable the other to do his part and loading is not complete until the cargo is so placed in the ship that she can proceed on her voyage in safety.

either there is an express stipulation to the contrary in the charterparty or the failure to load within the time specified arose from the fault of the shipowners or those for whom they are responsible (b). Where, however, the stipulation is merely that demurrage at an agreed rate shall be paid after the expiration of the lay days, the shipowner cannot, however long the ship is detained, claim damages for detention, but can only claim compensation for the delay at the demurrage rate (c). Of course, the charterers' obligation to load does not begin until the ship has "arrived" at the place of loading in the charterparty. It is always a question of the construction of the particular charterparty whether a ship has arrived or not (d).

But in any case the sum named as demurrage merely quantifies such damages as arise from the detention of the vessel and does not prevent the shipowner from recovering damages for any other breach of contract, as, e.g., failure to load a full and complete cargo (e).

The obligation of the charterer to unload arises as soon as the ship has reached the place where the carrying voyage is to end and is ready to unload, and in the absence of special agreement the shipowner is not bound to give notice that the ship has arrived and is ready to unload; in other respects the rights and liabilities of the shipowner and charterer with respect to unloading are substantially the same as with respect to loading (f).

## SUB-SECTION 2.—*Bills of Lading*

### *Form of bill of lading :—*

SHIPPED in apparent good order and condition (g) by \_\_\_\_\_ in  
and upon the good Ship called the \_\_\_\_\_ Master, now  
in the Port of \_\_\_\_\_ and bound for \_\_\_\_\_

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(b) *Alexander & Sons v. Aktieselskabet Dampskibet Hansa*, [1920] A. C. 88; 88 L. J. P. C. 182; *United States Shipping Board v. Frank Strick*, [1926] A. C. at pp. 558, 559; 95 L. J. K. B. 776.

(c) *Inverkip S.S. Co. v. Bunge & Co.*, [1917] 2 K. B. 198; 86 L. J. K. B. 1042.

(d) For a discussion of whether a ship is an "arrived" ship or not see *Stag Line v. Board of Trade*, [1950] 1 All E. R. 1105, C. A.

(e) *Aktieselskabet Reidar v. Arcos, Ltd.*, [1927] 1 K. B. 353; 96 L. J. K. B. 38.

(f) *Nelson v. Dahl*, 12 Ch. D., at p. 588. See also *The Varing*, [1931] P. 79.

(g) A shipowner who receives goods which are signed for as "in apparent good order and condition" to be delivered in the like good order and condition has the burden cast upon him of proving an exception which protects him from liability for damage found to have been caused. Moreover, by the statement as to "apparent good order and condition" the shipowner may be estopped as against the person taking the bill of lading for value or presenting it to

being marked and numbered as in the margin (h), and to be delivered in the like good order and condition at the aforesaid Port of (The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Thieves, Arrest and Restraint of Princes, Rulers and People, Collisions, Stranding and other Accidents of Navigation excepted, even when occasioned by the Negligence, Default or Error in Judgment of the Pilot, Master, Mariners, or other Servants of the Shipowner) unto or to Assigns : he or they paying freight for the said Goods, at per ton of 20 cwt. delivered, all other conditions and exceptions as per Charterparty, dated with Primage and Average accustomed (i), and all conditions and exceptions of the Charterparty dated are incorporated herewith. From the time at which the goods are received on the ship's tackles to the time at which they are discharged therefrom, all the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the Schedule thereto are to apply to the contract contained in this Bill of Lading, and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the Schedule thereto, as if the same were herein specifically set out. If, or to the extent that, any term of this Bill of Lading is repugnant to, or inconsistent with, any thing in such Act or Schedule it shall be void. In witness whereof the Master or Agent of the said Ship hath affirmed to Bills of Lading (k), all of this tenor and date, the one of which Bills being accomplished, the others to stand void. Dated in the day of (Signed) (l).

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get delivery of the goods, from alleging that there were at shipment external defects in them which were apparent to reasonable inspection. See *Silver v. Ocean Steamship Co.*, [1930] 1 K. B. 416; 99 L. J. K. B. 104; *The Skarp*, [1935] P. 134; 104 L. J. P. 68. But see *Canada and Dominion Sugar Co. v. Canadian National (West Indies) Steamships*, [1947] A. C. 46, where the statement as to "good order and condition" on the bill of lading was qualified and the shipowners were not estopped.

(h) For the particulars required by the Carriage of Goods by Sea Act, 1924, see *post*, p. 631.

(i) "Primage" is a small payment originally made to the master, but now usually paid to the shipowner; "average" in this case means certain expenses which are borne partly by the ship and partly by the cargo.

(k) Bills of lading are generally drawn in a set consisting of three parts, each being in itself a complete bill; of these one is retained by the master, one is retained by the shipper, and one is sent by post to the consignee, who can then, since it is a document of title, deal with the goods though they have not yet arrived (*post*, p. 623).

(l) The bill of lading is signed by the master (or the broker). It is unusually preceded by a mate's receipt, upon the giving of which the master becomes the baile of the goods: *The Okehampton*, [1913] P., at p. 178; 83 L. J. P. 5.

A bill of lading has three functions :—

1. It is a *receipt* for the goods and *prima facie* evidence that goods of that kind and amount were shipped (*m*), subject to any statements therein such as “weight, measurement, contents and value unknown” (*n*). The master of a ship has no authority to sign bills of lading for goods that were never shipped (*o*) : but by s. 8 of the *Bills of Lading Act*, 1855, a bill of lading is, in the hands of a consignee or indorsee for value, conclusive evidence of such shipment as against the master or other persons signing it, notwithstanding that the goods or some part thereof may not have been actually shipped, unless such holder of the bill of lading had actual notice of this fact at the time when he received it. But the master or person signing may exonerate himself by showing that the mistake was caused without any default on his part and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

2. It is, except as between a shipowner and a charterer, *evidence of the terms of the contract* made by the person shipping the goods (*p*).

As between a shipowner and a charterer the contract is in the charterparty and that contract is not affected by anything contained in a bill of lading given to the charterer (*q*), unless either the charterparty expressly refers to and incorporates part of the bill of lading (*r*) or the bill of lading expressly refers to and varies the charterparty (*s*).

As regards all other persons, *i.e.*, a shipper who is not a charterer or a consignee or indorsee of the bill of lading, the contract is in the bill of lading, which may, however, expressly refer to and so incorporate part of the charterparty (*t*).

The question with whom the contract in the bill of lading is

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(*m*) *Smith & Co. v. Bedouin Steam Navigation Co.*, [1896] A. C. 70; 65 L. J. P. C. 8.

(*n*) *New Chinese, etc., Co., Ltd. v. Occan S.S. Co., Ltd.*, [1917] 2 K. B. 664; 86 L. J. K. B. 1417.

(*o*) *Grant v. Norway*, 10 C. B. 665; 20 L. J. C. P. 981.

(*p*) *Sewell v. Burdick*, 10 App. Cas. 54; 54 L. J. Q. B. 156.

(*q*) *Leduc v. Ward*, 20 Q. B. D. 475; 57 L. J. Q. B. 379; *Temperley S.S. Co. v. Smyth*, [1905] 2 K. B., at p. 802; 74 L. J. K. B. 876.

(*r*) *Oriental S.S. Co. v. Tylor*, [1898] 2 Q. B. 518; 68 L. J. Q. B. 128.

(*s*) *Gullischen v. Stewart*, 18 Q. B. D. 317; 53 L. J. Q. B. 173; *Rodocanachi v. Milburn*, 18 Q. B. D. 47; 56 L. J. Q. B. 202.

(*t*) *Chappel v. Comfort*, 10 C. B. (N.S.) 802; 31 L. J. C. P. 58; *Fry v. Mercantile Bank of India*, L. R. 1 C. P. 689; 35 L. J. C. P. 306; *Temperley S.S. Co. v. Smyth (ubi supra)*; *The Draupner*, [1909] P., at p. 230; 78 L. J. P. 90; reversed on the facts, [1910] A. C. 450; 79 L. J. P. 88; *Aktieselskabet Ocean v. Harding*, [1925] 2 K. B. 371; 97 L. J. K. B. 684.



made depends upon the construction of the documents and the circumstances of the case.

If the ship is not chartered the contract in the bill of lading is between the shipper and the shipowner.

If the ship is chartered and used as a general ship and the charterparty is a demise the contract under the bill of lading is between the shipper and the charterer (u). If the charterparty is not a demise the presumption is that the contract in the bill of lading is between the shipper and the shipowner (a). This presumption may be rebutted by showing that the contract was in fact made with the charterer (b); but it is not rebutted by the fact that the charterparty contains a clause providing that the master, in signing bills of sale, shall do so as agent for the charterer, unless it is proved that the shipper not only knew of the charterparty but also had actual knowledge of its terms (c).

As regards persons who are ignorant of the terms of the charterparty, a shipowner is bound by any bill of lading which it is within the usual authority of a master to sign (d). If, however, the master, at the request of the charterer, signs bills of lading within his usual authority but inconsistent with the charterparty, and thus involves the shipowner in liabilities towards the holders of bills of lading, from which liabilities he would otherwise have been free, the charterer must indemnify the shipowner (e).

But a shipper who takes a bill of lading with actual knowledge that it is one which the master ought not to have signed because it is not in accordance with the terms of the charterparty cannot enforce the terms of the bill of lading uncontrolled by the charterparty (f).

A through bill of lading is one given for goods whose transit

(u) *Baumwoll v. Furness*, [1893] A. C. 8; 62 L. J. Q. B. 201; *Samuel, Samuel & Co. v. West Hartlepool Steam Navigation Co.*, 11 Com. Cas. 115.

(a) *Sandeman v. Scurr*, L. R. 2 Q. B., at pp. 97, 98; 86 L. J. Q. B. 58; *Manchester Trust v. Furness*, [1895] 2 Q. B., at p. 543; 64 L. J. Q. B. 766; *Wehner v. Dene S.S. Co.*, [1905] 2 K. B., at p. 98; 74 L. J. K. B. 550; *Associated, etc., Cement Co. v. Ashton*, [1915] 2 K. B. 1; 84 L. J. K. B. 519.

(b) See, e.g., *Morguand v. Banner*, 6 E. & B. 282; 25 L. J. Q. B. 318; *Harrison v. Huddersfield S.S. Co.*, 19 T. L. R. 386; *Samuel, Samuel & Co. v. West Hartlepool, etc., Co.* (ubi supra).

(c) *Manchester Trust v. Furness*, [1895] 2 Q. B. 539; 64 L. J. Q. B. 766.

(d) *Cox v. Bruce*, 18 Q. B. D. 147; 56 L. J. Q. B. 121; *Baumwoll, etc. v. Furness*, [1893] A. C., at p. 21; 62 L. J. Q. B. 201.

(e) *Kruger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.* [1907] A. C. 272; 76 L. J. K. B. 985; *Dawson Line, Ltd. v. Aktiengesellschaft Adler*, [1932] 1 K. B. 433; 101 L. J. K. B. 57.

(f) *Kruger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.* (ubi supra).

will be in different stages, *i.e.*, by the vessels of more than one shipowner, or partly by sea and partly by land.

8. It is a *document of title* to the goods and, until the goods have been delivered, a transfer of the bill of lading is, constructively, a transfer of the possession of the goods themselves (g).

Goods shipped under a bill of lading are usually deliverable to the shipper or consignee or his "order" or "assigns". Bills of lading containing these words (h) are transferable by indorsement and delivery, which transfers such property in the goods as was intended to be transferred, *i.e.*, either the general property, or, as in the case of a mortgage or pledge, the special property (i). And, by s. 1 of the *Bills of Lading Act, 1855*, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities, in respect of such goods as if the contract contained in the bill of lading had been made with himself". But this section applies only when the *property* passes so that a person to whom a bill of lading is transferred by way of pledge for a loan does not thereby become liable for freight (k).

But a bill of lading is not a negotiable instrument and, save as against stoppage *in transitu* (l), or in cases within the Factors Act (m), it gives an assignee no greater right to the goods than his assignor, and has no more effect than a transfer of the goods themselves (n).

### SUB-SECTION 8.—*Freight*

Freight is the reward paid under a charterparty or bill of lading for the carriage of goods; it is payable primarily by the

(g) *Sanders v. Maclean*, 11 Q. B. D., at p. 341; 52 L. J. Q. B. 481; 49 L. T. 482; *Clemens Horst Co. v. Biddell Brothers*, [1912] A. C., at p. 22; 81 L. J. K. B. 42.

(h) *Henderson v. Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253; 42 L. J. P. C. 60.

(i) Or it may pass no property at all, as, *e.g.*, where it is indorsed to an agent for some special purpose. The effect depends upon the circumstances of the case and the intention of the parties. The chief exposition of the law on this point is contained in *Sewell v. Burdick*, 10 App. Cas. 74; 54 L. J. Q. B. 156.

(k) *Sewell v. Burdick* (*ubi supra*).

(l) *Fuentes v. Montis*, L. R. 3 C. P., at p. 276; 38 L. J. C. P. 95. As to stoppage *in transitu*, see *post*, p. 669.

(m) *Post*, p. 660.

(n) *Cole v. North Western Bank*, L. R. 10 C. P., at p. 363; 44 L. J. C. P. 233.

person making the contract, *i.e.*, the charterer or shipper, but, under s. 1 of the *Bills of Lading Act, 1855* (o), it may also be payable by the consignee named in, or the assignee of, the bill of lading (p).

“The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered” (q). The right to freight is lost if the goods, for any reason other than the fault of their owner (r), fail to arrive at their destination, but it is not lost because the goods arrive in a damaged condition, unless the damage is so great that their nature has been altered (s). If the shipowner delivers only part of the goods shipped, he is entitled to freight *pro rata* (t); if he delivers the goods at a place short of their destination he may, under an express or inferred agreement with their owner, be entitled to freight *pro rata itineris* (u); but such an agreement will be inferred only when there is “a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods is intentionally dispensed with” (a).

In some cases freight is made payable before delivery of the goods. Such freight is termed *advance freight*. It is payable at the date fixed for payment although the goods have then been lost, and it cannot be recovered if the goods are lost subsequently to payment (b).

*Lien of shipowner.*—In addition to his rights of action a shipowner also has, at Common Law, a possessory lien for freight. As against the charterer, the lien exists for the freight due under

(o) *Ante*, p. 623.

(p) In a bill of lading there is usually, as in the form in the text, a clause making delivery conditional upon payment of freight by the consignee or his assigns. A charterparty frequently contains a *cesser clause*, by which the liability of the charterer for freight terminates when the cargo is loaded, the shipowner thereafter relying upon his lien: see *infra*.

(q) *Dakin v. Ozley*, 15 C. B. (N.S.), at pp. 664, 665; 33 L. J. C. P. 115.

(r) *Galam (The), Cargo ex, Brow. & Lush*, 167; 33 L. J. Ad. 97.

(s) *Asfar & Co. v. Blundell*, [1896] 1 Q. B. 123; 65 L. J. Q. B. 138.

(t) *Dakin v. Ozley*, (*ubi supra*).

(u) *Id.*

(a) *The Soblomsten*, L. R. 1 Ad. & Eccl., at p. 297; 36 L. J. Ad. 5; 15 L. T. 393. The rules given in this paragraph do not apply to *lump sum freight*, which is a gross amount paid for the use of the ship, irrespective of the amount of the cargo.

(b) *Byrne v. Schiller*, L. R. 6 Ex. 319; 40 L. J. Ex. 177; *Smith, Hall & Co. v. Pyman, Bell & Co.*, [1891] 1 Q. B., at p. 46; 60 L. J. Q. B. 127; see also *Oriental S.S. Co. v. Tylor*, [1893] 2 Q. B. 618; 63 L. J. Q. B. 123.

the charterparty; but as against other persons it exists only for the freight due under the bill of lading, except in so far as some contrary stipulation is expressed in the bill of lading (c). This lien exists over all goods coming to the same consignee on the same voyage for the freight due on all or any part of the goods (d). It exists only where the agreed time of payment is contemporaneous with the time of delivery of the goods (e); it does not, therefore, exist for freight payable after delivery (f). The lien may be waived, as, e.g., by the acceptance of a bill of exchange for the freight, in which case the lien is lost while the bill is outstanding (g). And, since it depends upon possession, it is lost by parting with the possession of the goods. But a delivery of part of the goods does not prevent the lien from attaching to the remainder in respect of the whole freight (h).

A shipowner has also at Common Law a possessory lien for general average contributions (i).

And, by express agreement, a right of lien may also exist in respect of other charges, such as dead freight (k) or demurrage (l).

By ss. 492-501 of the *Merchant Shipping Act*, 1894, if the owner of goods imported from foreign parts fails to land or take delivery of them at the time agreed, or, if no time is agreed, within seventy-two hours (exclusive of a Sunday or holiday) from the time of the report of the ship at the Custom House, the shipowner may land or unship the goods and place them at the wharf or warehouse named in the charterparty or bill of lading, or if no such place is named, at some wharf or warehouse in which goods of the like nature are usually placed. And in such a case the shipowner may, by giving written notice to the person in whose custody the goods are placed, retain his lien for freight, and, subject to certain specified conditions, that person may, and, if required by the shipowner, shall, if the lien is not discharged at the end of ninety days (or, if the goods are perishable,

(c) *Pearson v. Goschen*, 17 C. B. (N.S.) 852; 38 L. J. C. P. 265; *Fry v. Mercantile Bank*, L. R. 1 C. P. 689; 35 L. J. C. P. 306; *Turner v. Haji Goolam Mahomed Azam*, [1904] A. C. 826; 74 L. J. P. C. 17.

(d) *Sodergren v. Flight*, cited in *Hanson v. Meyer*, 6 East, at p. 622; 8 R. R. 572.

(e) *All son v. Bristol Marine Insurance Co.*, 1 App. Cas., at p. 225.

(f) *Foster v. Colby*, 8 H. & N. 705; 28 L. J. Ex. 81.

(g) *Tamaco v. Simpson*, L. R. 1 C. P. 368; 35 L. J. C. P. 196.

(h) *Bernal v. Pym*, 1 Gale 17.

(i) *Ante*, p. 566; see *Huth v. Lamport*, 16 Q. B. D. 735; 55 L. J. Q. B. 289.

(k) *McLean v. Fleming*, L. R. 2 H. L. (Sc.) 128.

(l) See, e.g., *Rederiaktieselskabet Superior v. Dewar & Webb*, [1909] 2 K. B. 998; 78 L. J. K. B. 100. Here the lien was for "all freight, demurrage and all other charges whatsoever".

at such earlier period as he thinks fit), sell by public auction sufficient of the goods to satisfy the customs dues, expenses and freight.

• SUB-SECTION 4.—*Liabilities of the Shipowner as Carrier*

Apart from any express stipulation or statutory provision, a shipowner who is a common carrier is liable in *tort* for all loss or damage occasioned to the goods in transit, except such as arises from the act of God or the King's enemies, or the inherent defects of the goods themselves (*m*), or from their having been made the subject of a general average sacrifice (*n*). It is not settled whether a shipowner who is not a common carrier has, in the absence of any contrary stipulation, the same liability as a common carrier or whether he is only liable as a bailee for his own default or negligence (*o*).

Charterparties and bills of lading represent the efforts of many generations of shipowners to free themselves from liability by special contracts. At first the exceptions were few, but gradually addition after addition was made until the shipowner was protected against almost every conceivable risk and in some cases even against his own negligence or that of his servants or agents.

With regard, however, to the exceptions, the following points must be noted: In the first place, neither the Common Law exceptions nor any express exceptions or stipulations in the charterparty or bill of lading will excuse the shipowner if he or his servants could by reasonable care have avoided the operation of the excepted peril or lessened its effects unless there is also a stipulation exempting him from the negligence of his servants (*p*). In the second place, subject to any plain and express stipulation to the contrary (*q*), the benefit of any exception or stipulation may be qualified or lost by the operation of certain undertakings

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(*m*) *Ante*, p. 601.

(*n*) *Ante*, p. 566.

(*o*) See *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 43 L. J. Ex. 216 (discussed in *Watkins v. Cottell*, [1916] 1 K. B. 10; 85 L. J. K. B. 287); *Nugent v. Smith*, 1 C. P. D. 19, 248; 45 L. J. C. P. 697; *The Xantho*, 12 App. Cas., at p. 510; 56 L. J. Ad. 146; *Hamilton v. Pandorf*, 12 App. Cas., at p. 526; 57 L. J. Q. B. 24.

(*p*) *Notara v. Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; *The Xantho*, 12 App. Cas. 503; 56 L. J. Ad. 146; *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B., at p. 576; 90 L. J. K. B. 1853; *Paterson Steamships, Ltd. v. Canadian, etc., Wheat Producers*, [1934] A. C., at p. 545; 103 L. J. P. C. 166.

(*q*) See *Nelson Line, Ltd. v. James Neilson & Sons, Ltd.*, [1908] A. C. 16; 77 L. J. K. B. 82; *L. & N. W. Ry. v. Neilson*, [1922] 2 A. C., at p. 266; 91 L. J. K. B. 680.

that, in the absence of any express stipulation to the contrary, are implied in every contract for the carriage of goods by sea.

These implied undertakings are (i) that the ship is seaworthy; (ii) that it shall commence and carry out the voyage with reasonable dispatch, and (iii) that it shall not deviate unjustifiably.

The implied undertaking of seaworthiness before the commencement of the carrying voyage, and at the time of receiving the cargo, has already been noted (r).

After the commencement of the voyage or the loading of the goods (s) a breach of this implied warranty of seaworthiness does not put an end to the contract of affreightment (t), but, if unseaworthiness is the cause of any loss or damage, prevents the carrier from relying on any exception limiting his liability unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness (u).

Delay in arriving at the port of loading has already been mentioned (a). Any unjustifiable delay in the prosecution of the voyage will put an end to the contract if it is so great as to frustrate the commercial object of the voyage, otherwise it will give rise to a claim for damages (b) unless the delay is due to excepted perils (c).

Subject to the terms of the charterparty or bill of lading (d), and apart from the provisions of the *Carriage of Goods by Sea Act, 1924* (e), deviation is permissible only to avoid imminent danger to the ship or cargo or for the purpose of saving life (f). But in such cases deviation may be justifiable even though the

(r) *Ante*, p. 617. As to its modification by the *Carriage of Goods by Sea Act, 1924*, see *post*, p. 630.

(s) *M'Fadden v. Blue Star Line*, [1905] 1 K. B. 697; 74 L. J. K. B. 428; *Reed & Co. v. Page, Son & East*, [1927] 1 K. B. 473; 96 L. J. K. B. 890.

(t) *Kish v. Taylor*, [1912] A. C. 604; 81 L. J. K. B. 1027.

(u) *Atlantic Shipping, etc. v. Dreyfus*, [1922] 2 A. C., at p. 260; 91 L. J. K. B. 518; *The Chrstel Vinnen*, [1924] P., at pp. 212, 213; 93 L. J. P. 188; *Elder, Dempster Co. v. Paterson, Zochonis Co.*, [1924] A. C., at pp. 548, 549; 93 L. J. K. B. 625. "Underlying the whole contract of affreightment there is an implied condition upon the operations of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship": [1922] 2 A. C., at p. 260.

(a) *Ante*, p. 617.

(b) *Bank Line, Ltd. v. Arthur Capel & Co.*, [1919] A. C., at pp. 457, 458; 88 L. J. K. B. 211; see also *Brandt v. Liverpool, etc., Navigation Co.*, [1924] 2 K. B. 575; 93 L. J. K. B. 646.

(c) *Barker v. M'Andrew*, 18 C. B. (N.S.) 759; 84 L. J. C. P. 191; 144 R. R. 657.

(d) See *Frenkel v. MacAndrews & Co.*, [1929] A. C. 545; 98 L. J. K. B. 389.

(e) *Id.*, Art. IV (4). *post*, p. 632.

(f) *Scaramanga v. Stamp*, 5 C. P. D. 295; 49 L. J. C. P. 674; *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1932] A. C. 328; 101 L. J. K. B. 165.

necessity for it was caused by unseaworthiness (g). Unjustifiable deviation puts an end to the contract (h).

Where the contract is thus put an end to, the carrier is deprived of the benefit of any special conditions and exceptions limiting his liability, and is remitted to whatever rights he would have at Common Law independently of the special contract; thus, if he is a common carrier, he is liable unless he can show that the loss or damage is due to one of the Common Law exceptions and that it would have happened although there had been no deviation (i).

The *implied undertakings by a shipper* not to ship dangerous goods without notice applies to carriage by sea as well as to carriage by land (k). By the *Merchant Shipping Act, 1894* (l), penalties are imposed upon anyone who sends by any vessel, or who, not being the master or owner of the vessel, carries thereon any dangerous goods (as defined by the Act) without marking their nature on the package and giving written notice of their nature and of the name and address of the sender to the master or owner of the ship, and also upon anyone who sends or carries such goods under a false description or who falsely describes the sender or carrier thereof. The master or owner of any vessel may refuse to take on board any package which he suspects to contain dangerous goods, and may require it to be opened, and any dangerous goods which have been sent or brought aboard any vessel without being so marked or without notice of their nature may be thrown overboard by the master or declared forfeited and disposed of by any Court having Admiralty jurisdiction.

**Statutory limitations of liability.**—By s. 502 of the *Merchant Shipping Act, 1894*, the owner of a *British* sea-going ship (including by s. 71 of the *Merchant Shipping Act, 1906*, any charterer to whom the ship is demised) is not liable at all for any loss of or damage to goods happening without his actual fault or privity (m) in the following cases :—

(a) *Kish v. Taylor* (ubi supra).

(h) See cases cited in the next note.

(i) *Joseph Thorley, Ltd. v. Orch & S.S. Co.*, [1907] 1 K. B., at p. 669; 76 L. J. K. B. 595; *Morrison v. Shaw, Savill & Co.*, 85 L. J. K. B. 724; affirmed, [1916] 2 K. B. 788; *Cunard S.S. Co. v. Buerger*, [1927] A. C. 1; 96 L. J. K. B. 18. As to frustration of the contract as a result of events not within the control of the carrier, see pp. 207, 208.

(k) See ante, p. 598.

(l) Ss. 446-450.

(m) Where the shipowner is a corporation the fault or privity must be that of the person who is really the directing mind and will of the corporation": *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A. C., at p. 713; 84 L. J. K. B. 1281.

- i. Where goods, merchandise, or other things whatsoever (n) taken in or put on board his ship are lost or damaged by fire on board the ship (o).
- ii. Where gold, silver, diamonds, watches, jewels or precious stones are taken in or put on board his ship (p), the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading, or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, or making away with.

This section protects the shipowner or charterer even where the fire was caused by unseaworthiness (q).

By the same Acts (r), where, without the actual fault or privity of the owner or charterer of any ship, British or foreign—

- (a) loss of life or personal injury is caused to a person carried on the ship;
- (b) damage or loss is caused to goods, etc., carried on the ship;
- (c) loss of life or personal injury is caused to a person carried in another vessel by the improper navigation of the ship;
- (d) damage or loss is caused by the improper navigation of the ship to any other vessel, or to goods on any other vessel, or, by s. 1 of the *Merchant Shipping Act*, 1900, to property or rights of any kind, whether on land or water by improper navigation or management of the ship. "Management" of the ship will include any negligent act of the shipowner's servants which is carried out in furtherance of the cargo carrying adventure and which endangers the safety of the ship herself (s): it will also include management of appliances fitted to the ship (t).

the amount of liability is limited as follows:—

- i. In respect of loss of life or personal injury, either alone or together, with loss of, or damage to, vessels, goods, etc.,

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(n) These words include passengers' luggage: *The Stella*, [1900] P. 161; 69 L. J. P. 71.

(o) "Fire" includes smoke, and also water used in putting out fire: *The Diamond*, [1906] P. 282; 75 L. J. P. 90.

(p) E.g., a gold watch, cigar cutter, and sovereign purse containing £5, stolen from a passenger's cabin: *Smitton v. Orient Steam Navigation Co.*, 96 L. T. 848.

(q) *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1981] 1 K. B. 195; 99 L. J. K. B. 658; affirmed in H. L., [1981] W. N. 183.

(r) Act of 1894, s. 503; Act of 1906, s. 71.

(s) *The Teal* (1949), 82 Ll. L. Rep. 414.

(t) *The Athelvictor*, 175 L. T. 256; 78 Ll. L. Rep. 529.



to an aggregate amount not exceeding £15 per ton of his ship's tonnage.

- ii. In respect of loss of or damage to vessels, goods, etc., whether or not there be in addition loss of life or personal injury, an aggregate amount not exceeding £8 per ton (u).

These provisions may, however, be excluded by an express contrary stipulation (a).

**The Carriage of Goods by Sea Act, 1924.**—By this Act the power of a carrier to exempt himself from liability by conditions and stipulations in a bill of lading has, in certain cases, been limited, and, in the cases to which the Act applies, his responsibilities, liabilities, rights and immunities have been definitely fixed.

The Act and Rules in the Schedule apply *only to the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port, whether in or outside Great Britain or Northern Ireland* [s. 1].

They apply *only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea* [Schedule, Art. I (b)]. They do not therefore apply to charterparties, but they apply to a bill of lading issued under a charterparty from the moment at which such bill of lading regulates the relations between a carrier and a holder of the same (b) [Schedule, Art. I (b), Art. V].

Every bill of lading issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply must contain an express statement that it is to have effect subject to the provisions of the Rules as applied by the Act [s. 8].

The term “carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper: the term “goods” includes goods, wares, merchandises, and articles of every description, *except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried* [Art. I (a) (c) (e)].

The responsibilities and liabilities of the carrier are as follows :—

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(u) Where the amount of £15 per ton is insufficient to meet all claims the claimants in respect of loss or life are entitled in the first instance to £7 per ton and then rank equally with claimants in respect of life against the remaining £8 per ton: *The Victoria*, 13 P D 125; 57 L. J. Adm. 108.

(a) *The Satanita*, [1897] A C. 59; 68 L. J. P. 1 (a decision upon a similar section of the Merchant Shipping Act Amendment Act, 1862).

(b) See *ante*, p. 621.

He is bound, before and at the beginning of the voyage, to exercise due diligence to

- i. "Make the ship seaworthy."
- ii. "Properly man, equip, and supply the ship."
- iii. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation [Art. III (1)].

With regard to this rule it must be noted that the obligation of the shipowner is merely to *exercise due diligence* to make the ship seaworthy; by s. 2 of the Act no absolute undertaking of seaworthiness is to be implied in contracts to which the Rules apply. But his obligation is not limited to his personal diligence and he is responsible for lack of diligence on the part of his servants or agents (c).

He must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried [Art. III (2)].

After receiving the goods into his charge he, or his master or agent, must issue to the shipper, on demand by him, a bill of lading containing prescribed particulars [Art. III (8)].

Such a bill of lading will be *prima facie* evidence of the receipt by the carrier of the goods as therein described, and the shipper will be deemed to have guaranteed to the carrier the accuracy, at the time of shipment, of the marks, number, quantity, or weight of the goods, and must indemnify the carrier against all loss, damages and expenses resulting from any inaccuracy therein: but the right of the carrier to this indemnity will not limit his responsibility under the contract to any person other than the shipper [Art. III (4) (5)] (d).

Unless written notice of loss or damage and its general nature is given to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal will be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. Written notice is not, however, necessary if the state of the goods has at the time of their receipt been the subject of joint survey or inspection. *In any event the carrier will be discharged from all liability in respect of loss or damage unless action is brought within one year*

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(c) *Angliss & Co. v. P. & O. Steam Navigation Co.*, [1927] 2 K. B. 456; 96 L. J. K. B. 1084.

(d) By s. 5 of the Act the provisions of Art. III (4) and (5) do not in certain circumstances apply, so far as concerns weight, to a "bulk cargo"—e.g., coal, timber, grain, etc.

after delivery of the goods or the date when the goods should have been delivered [Art. III (6)].

Any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations imposed by this Article or lessening such liability otherwise than as provided in the Rules is null and void [Art. III (8)].

The rights and immunities of the carrier are as follows :—

He is not liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on his part to comply with the requirements of Article III (1), but whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence will be upon him [Art. IV (1)].

He is not responsible for loss or damage resulting from (a) Act, neglect or default of the master, pilot or servants in the navigation or management (e) of the ship : (b) Fire, unless caused by his actual fault or privity : (c) Perils, dangers and accidents of the sea or other navigable waters : (d) Act of God : (e) Act of war : (f) Act of public enemies : (g) Arrest or restraint of princes, rulers or people, or seizure under legal process : (h) Quarantine restrictions : (i) Act or omission of the shipper or owner of the goods or his agent : (j) Strikes or lock-outs or stoppage or restraint of labour : (k) Riots and civil commotions : (l) Saving or attempting to save life or property at sea : (m) Wastage or any other loss or damage arising from inherent vice of the goods : (n) Insufficiency of packing : (o) Insufficiency or inadequacy of marks : (p) Latent defects not discoverable by due diligence : (q) Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of his servants or agents, the burden of proof being, however, upon him to show that no such fault, privity, or neglect contributed to the loss or damages [Art. IV (2)].

Moreover, any deviation in saving or attempting to save life or property at sea, or any reasonable deviation (f), shall not be deemed to be an infringement or breach of the rules or of the

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(e) I.e., the management of the ship itself as a navigable object, as distinct from its management in relation to the carriage of cargo, e.g., in relation to stowage see *Gosse Millard v Canadian, etc., Marine*, [1929] A. C. 228; 98 L. J. K. B. 181

(f) For definitions of reasonable deviation, see *Foscolo Mango & Co., Ltd. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; affirmed, [1932] A. C. 328; 101 L. J. K. B. 165

contract of carriage and the carrier will not be liable for any loss or damage resulting therefrom [Art. IV (4)].

The liability of the carrier for loss or damage to goods is limited to £100 per package or unit (or such higher sum as may be agreed between him and the shipper) unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, in which case the declaration in the bill of lading will be *prima facie* evidence but not binding or conclusive against the carrier.

In no event, however, will the carrier be responsible for loss or damage to goods if their nature or value has been knowingly misstated by the shipper in the bill of lading [Art. IV (5)].

Goods of an inflammable, explosive or dangerous nature, to the shipment whereof the carrier has not consented with knowledge of their character, may at any time be landed, destroyed, or rendered innocuous by the carrier without compensation, and the shipper of such goods will be liable for all damages and expenses directly or indirectly arising from such shipment. And if any such goods shipped *with* such knowledge become a danger to the ship or cargo they may similarly be landed, destroyed, etc., without liability on the part of the carrier, except to general average, if any [Art. IV (6)].

By Article V a carrier may surrender in whole or in part all or any of his rights or immunities or may increase any of his responsibilities and liabilities under the Rules, provided that such surrender or increase is embodied in the bill of lading.

By Article VIII nothing in the Rules is to affect the rights and obligations of the carrier under any statute in force relating to the limitation of the liability of owners of sea-going vessels.

By s. 6 (1) of the Act nothing in the Act shall affect the operation of ss. 446-450, 502 and 503 of the *Merchant Shipping Act, 1894*, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels (g).

*Special Conditions.* By s. 4 of the Act and Article VI of the Rules it is provided that—

- i. In relation to the carriage of goods by sea by ships carrying goods from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland or to a port in the Irish Free State (h), and

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(g) See *ante*, pp. 628, 629.

(h) Section 4.

- ii. In other cases, in regard to "any particular goods", that is to say not in regard to "ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement" (i)—

a carrier and a shipper may enter into an agreement in any terms as to the responsibilities, liabilities, rights and immunities of the carrier, or his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents with regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods, *provided that no bill of lading is issued and that the terms agreed upon are embodied in a receipt which shall be a non-negotiable document and shall be marked as such.*

**Duties and powers of master during voyage.**—The conduct of the ship during the voyage is in the hands of the master, who has implied authority as agent for the owner and the charterer to do whatever is necessary for the proper carrying out of the contract (k), or "usual and necessary for the use and enjoyment of the ship" (l). The master is also a bailee of the goods and bound to take reasonable care of them and reasonable measures for their preservation (m).

In certain circumstances, moreover, the master, as an *agent of necessity* for either the shipowner or cargo-owner, may take extraordinary steps, such as selling the cargo, or raising money by bottomry (n) on the ship, freight and cargo or the cargo

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(i) Art. VI.

(k) *The Turgot*, 11 P. D. 21; 54 L. T. 276; *Morgan v. Castlegate S.S. Co.*, [1893] A. C. 88; 62 L. J. P. C. 17.

(l) *Grant v. Norway*, 10 C. B., at p. 687; 20 L. J. C. P. 93.

(m) *Notara v. Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158.

(n) A bottomry contract is an agreement whereby the ship (with or without the freight or cargo), or the cargo alone (in which case the contract is sometimes called *respondentia*) is hypothecated as a security for the payment, in the event only of the safe arrival of the ship at her destination, of money advanced for the necessities of the ship to enable it to proceed upon its voyage (*The Atlas*, 2 Hag. Adm. 53). It is essential to a bottomry contract that there should be a *maritime risk*—i.e., that the money should be repayable only if the ship or cargo arrives safely at its destination and that it should not be an advance upon the personal credit of the shipowner, master or cargo-owner (*Stainbank v. Shepard*, 18 C. B. 418; 22 L. J. Ex. 341; *The Heinrich Bjorn*, 10 P. D. 44; 11 App. Cas. 270; 55 L. J. Adm. 80). Raising money on bottomry is never justifiable if the master can obtain money upon his personal credit or the credit of the owner: *Heathorn v. Darling*, 1 Moore P. C. 5; *Soares v. Rahn*, 3 P. C. 11.

alone (o), or pledging the credit of the owner for necessities (p). But to justify any such step, he must show (i) that it was necessary, and (ii) that it was impossible for him to communicate with the shipowner or cargo-owner, as the case may be, or agent for either, or that, having communicated, he received no instructions (q). The rule that the authority of the master to take such steps is based upon necessity is more stringent as regards the cargo-owner than the shipowner, for the master does not take goods on board as agent for the former, and is not his agent at all unless an overruling necessity arises during the voyage (r). And even in such a case, the foundation of the master's authority is the prospect that the course which he adopts will be most beneficial to the cargo (s).

**Who can sue and be sued for failure to carry safely.**—In an action of *contract*, the parties to the contract are the persons to sue or be sued, but by s. 1 of the *Bills of Lading Act*, 1855, a consignee or indorsee to whom the property has passed has the same rights of action as if the contract had been made with himself (t). In *tort*, any person who is or was in possession of the goods can be sued by any person with any proprietary right in the goods (u).

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(o) *Atlantic Mutual Insurance Co. v. Huth*, 16 Ch. D. 474. To justify a sale of cargo it must be shown that the master could not by any means available to him carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination (16 Ch. D., at p. 481).

(p) *Gunn v. Roberts*, L. R. 9 C. P. 331; 43 L. J. C. P. 223.

(q) *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222; 27 L. T. 857; *The Karnak*, L. R. 2 P. C. 505; 38 L. J. Adm. 57.

(r) *The Pontida*, 9 P. D., at p. 180; 53 L. J. Adm. 78.

(s) *The Onward*, L. R. 4 Ad & Eccl., at p. 57; 42 L. J. Adm. 61. Thus the act of the master in properly jettisoning cargo is done by him, as the agent of the cargo-owner, for the benefit of both ship and cargo: *Burton v. English*, 12 Q. B. D., at pp. 220, 221; 53 L. J. Q. B. 138.

(t) *Ante*, p. 621.

(u) *Ante*, p. 601.

## CHAPTER V

## SALE OF GOODS. PLEDGES AND MORTGAGES OF CHATTELS

SECTION 1.—*Sale of Goods*

THE law relating to the sale of goods was codified by the *Sale of Goods Act*, 1898. Where, therefore, earlier decisions are cited as illustrations, it must be remembered that they are binding only in so far as they are consistent with the Act; it is the statute alone which must be looked at and must govern the rights of the parties (a). But by s. 61 (2) of the Act it is expressly provided that the rules of the Common Law continue to apply where they are not inconsistent with the Act.

By s. 55 it is also expressly provided that "where any right, duty, or liability would arise under a contract of sale, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract".

Thus, in *Cointat v. Myham*, on a sale of meat in Smithfield Market evidence was admitted to show that, by the usage of the market, no warranty as to its fitness was implied (b).

By s. 62 of the Act "goods" include "all chattels personal other than things in action, and also emblements [industrial growing crops] and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

The term "goods" applies to all *choses in possession* which are the subject of property, except money. But even a current coin may be treated as goods if it is sold as a curiosity (c).

Animals *feræ naturæ* are not chattels nor the subject of property until they are reduced into possession (d).

A ship is "goods" within s. 62 of the Act (e), but British

(a) *Bristol Tramways, etc., Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B., at p. 886; 79 L. J. K. B. 1107.

(b) 84 L. J. K. B. 2258. As to the incorporation of usage into contracts, see also pp. 76, 97. Note that "a stranger to a locality, or trade, or market, is not held to be bound by the custom of such locality, trade, or market because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know and act upon such custom": *Robinson v. Mollett*, L. R. 7 H. L., at p. 818.

(c) *Moss v. Hancock*, [1899] 2 Q. B. 111; 68 L. J. Q. B. 657.

(d) *R. v. Roe*, 11 Cox, at p. 557.

(e) *Behnke v. Bede Shipping Co.*, [1927] 1 K. B. 649; 96 L. J. K. B. 325

ships are governed by provisions of the Merchant Shipping Act, 1894, which in some respects modify the Sale of Goods Act.

### SUB-SECTION 1.—*Formation of the Contract*

#### Contract of sale [s. 1].

(1) "A contract of sale of goods is a contract whereby the seller (i) transfers or (ii) agrees to transfer the *property* in goods to the buyer for a money consideration called the price.

By s. 62 the term "buyer" means a person who buys or agrees to buy goods, and the term "property" means the general property in goods and not merely a special property.

"There may be a contract of sale between one part owner and another."

(2) "A contract of sale may be absolute or conditional."

But by s. 61 (4) the provisions of the Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

(8) "Where, under a contract of sale, the property in goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell."

Note that the term "contract of sale" includes both (i) a sale, by which the property actually passes to the buyer, leaving the seller with only the right to recover the price, and (ii) an agreement to sell, in which the property in the goods does not pass to the buyer, although he may have paid the price.

(4) "An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

The question whether a contract for the acquisition by A of an article to be made or produced for him by B is a contract for the sale of goods or for work and labour is one which has frequently caused difficulty.

In the case of *Robinson v. Graves* (f) the defendant employed an artist to paint a picture for 250 guineas. The Court of Appeal, after reviewing the authorities, held that this was a contract for work and labour, the substance of the contract being the skill and work of the artist and it being only ancillary

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(f) [1935] 1 K. B. 579; 104 L. J. K. B. 441.



to that contract that the property in some materials would pass to the customer.

In this case the Court of Appeal accepted the rule laid down in the case of *Clay v. Yates (g)*, namely, that the test is whether the work and labour or the materials constitute the essence of the contract.

In the case of *Lee v. Griffin (h)* it was held that a contract for the supply of a set of artificial teeth was a contract for the sale of goods. But even here the ground of decision was that "the substance of the contract was for goods sold and delivered", the case bearing "a strong resemblance to that of a tailor supplying a coat".

And, in *Robinson v. Graves (i)* it was pointed out that there may be cases where a contract for the supply of a portrait is a contract for the sale of a chattel, and the Court refused to express any opinion as to the correctness of the decision in *Isaacs v. Hardy (k)*, in which it was held that there was a contract for the sale of goods where a picture dealer, whose sole object was to acquire something which he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price.

**Capacity of parties [s. 2].**—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property (*l*).

**Formalities of the contract [s. 3].**—Subject to the provisions of the Act and of any other statute, "a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties".

Nothing in this section, however, affects the law relating to corporations.

*When writing is required—*

A. Where a contract for the sale of goods is not to be performed within one year from the making thereof, it is governed by s. 4 of the Statute of Frauds (*m*).

(g) 1 H. & N. 73; 25 L. J. Ex. 237.

(h) 1 B. & S. 272; 30 L. J. Q. B. 252.

(i) *Ubi supra*.

(k) *Cab. & P.* 287.

(l) As to infants, lunatics and persons incapacitated by drink, see *ante*, Chap. 3.

(m) *Prested Miners' Gas Co. v. Garner*, [1911] 1 K. B. 425; 80 L. J. K. B. 819.

B. A contract for the sale of goods of the *value* (not price) of ten pounds or upwards is *also* governed by s. 4 of the *Sale of Goods Act*, and is not "enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf" (n). "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery" (o).

"There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not" (p).

The word "acceptance" is used in the Act in two senses, i.e., (i) an acceptance in performance of the contract [s. 35, *post*, p. 667] and (ii) an acceptance in recognition of the contract. "If there is acceptance within the meaning of the later section, the requirements of s. 4 have been complied with, but if there is no acceptance within s. 35 there may still be acts amounting to an acceptance within the meaning of s. 4 (3) which will render a verbal contract enforceable" (q).

There may be accordingly an acceptance which is sufficient to make a verbal contract that is enforceable by action, but which does not prevent the buyer, when sued, from setting up that he had a right to reject the goods as not being in accordance with the contract.

Thus, in the case of *Abbott & Co. v. Wolsey* (r), hay sold under a verbal contract was sent by barge to the defendant's wharf. The defendant went on board the barge, took a sample of the hay, and, after examining it, said: "The hay is not to

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(n) S. 4 (1). A special arrangement with regard to delivery of the goods, altering the position which would have existed in the absence of any arrangement, is a term of the contract which should be included in the note or memorandum: *Walford v. Narin*, [1948] 2 K. B. 176; [1948] L. J. R. 1549.

(o) S. 4 (2).

(p) S. 4 (3).

(q) *Re a Debtor*, [1899] Ch. 225; 108 L. J. Ch. 188.

(r) [1895] 2 Q. B. 97; 64 L. J. Q. B. 587. A similar case before the Act is that of *Page v. Morgan*, 15 Q. B. D. 228; 54 L. J. Q. B. 484; but in the later case the Court was careful to point out that the law is now to be found in the Act itself, and not in cases decided before the Act.

my sample, and I shall not have it". It was held by the Court of Appeal that the act of taking the sample, as explained by the words which accompanied it, was evidence upon which it might properly be found that the sample was taken to be compared with a former sample given in connection with a contract for the sale of hay, and, therefore, that the act of taking it was a recognition of an existing contract for the sale of the hay.

Acceptance may precede, be contemporaneous with, or follow the receipt (s).

The section applies to a single contract for several articles if their total value is ten pounds or more (t).

The rules relating to the requisite note or memorandum in writing have already been discussed (u).

Earnest is quite distinct from part payment, being a coin or something of value, such as a ring, given by a buyer to a seller, not on account but irrespective of the price and accepted by the seller to mark the final assent of both parties to the contract (x).

Part payment, on the other hand, is a payment of part of the price, and to satisfy the statute there must be an actual payment by the buyer of part of the price and it must also be "accepted or in some way acknowledged by the seller so as to constitute a recognition by the seller that there is a contract" (y). Thus, there is no part payment

- (i) where by an express term of the contract of sale itself, money previously owing by the seller to the buyer is to be retained on account of the price of the goods sold (z);
- (ii) where a deposit is received by brokers as stakeholders and no directions with regard to it have been given by the vendors (a);
- (iii) where a cheque is sent to the vendor and immediately returned by him on the ground that there is no contract (b). But there is a part payment within the section where the vendors keep a cheque sent by the purchaser

(s) *Cusak v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261.

(t) *Baldehy v. Parker*, 2 B. & C. 37.

(u) *Ante*, p. 52.

(x) See *Goodall v. Skelton*, 2 H. Bl. 316; 3 R. R. 479; *Farr, Smith & Co. v. Messers, Ltd.*, [1923] 1 K. B., at p. 409; 97 L. J. K. B. 126; and as to the history of earnest, *Horne v. Smith*, 27 Ch. D., at p. 101; 53 L. J. Ch. 1055. The sending by a purchaser of bags to contain the goods bought does not amount to giving earnest: *Sumner v. Browne*, 25 T. L. R. 475.

(y) *Behnke v. Bede Shipping Co.*, [1927] 1 K. B., at p. 659.

(z) *Norton v. Davison*, [1899] 1 Q. B. 401; 68 L. J. Q. B. 265, following *Walker v. Nussey*, 16 M. & W. 302; 16 L. J. Ex. 120. As to payment by a bill of exchange or cheque, see *ante*, p. 216.

(a) *Behnke v. Bede Shipping Co.* (*supra*).

(b) *Davis v. Phillips, Mills & Co.*, 24 T. L. R. 1.

while they are trying to induce him to vary the terms of the contract and return it upon his refusal to do so (c).

The only effect of non-compliance with the conditions of s. 4 is that the contract is "unenforceable by action". The contract itself is good, and all the legal consequences of a valid contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. The seller may, therefore, call upon the buyer to pay for the goods, and if he fails to do so, the seller may treat the contract as rescinded, the effect of the rescission being to revest the property in the seller (d).

### Subject-matter [s. 5].

(1) "The goods which form the subject of a contract of sale may be either *existing* goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract, in this Act called *future goods*". Existing goods may be either *specific* goods or *unascertained* goods.

By s. 62 "*specific goods*" are defined as "goods identified and agreed upon at the time a contract of sale is made".

"In order that goods may be specific they must be identified and not merely identifiable" (e). Thus—

In *Kursell v. Timber Operators, Ltd.* (f), there was a contract for the sale of all "merchantable timber" in a forest, defined as "all trunks and branches of trees but not young trees of less than 6 inches in diameter at a height of 4 feet from the ground", with a proviso that the timber was to be cut not more than 12 inches from the ground. *Held*, that this was not a contract for the sale of specific goods.

In *Re Wait* (g), it was held that a contract for the sale of 500 tons of wheat, part of a consignment arriving by a particular ship, was not a contract for the sale of specific goods.

*Unascertained* goods are goods defined only by a description applicable to all goods of the same class, e.g., twenty motor bicycles which are defined merely as being of a particular make and type.

(2) "There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen."

As a general rule any person may sell or offer for sale goods

(c) *Parker v. Crisp & Co.*, [1919] 1 K. B. 481; 88 L. J. K. B. 775.

(d) *Taylor v. Great Eastern Ry.*, [1901] 1 K. B. 774; 70 L. J. K. B. 499.

(e) *Kursell v. Timber Operators, etc.*, [1927] 1 K. B. 298, at p. 314; 96 L. J. K. B. 569.

(f) *Ubi supra*.

(g) [1927] 1 Ch. 606; 96 L. J. Ch. 179.

of which he is not the owner, but which he expects or hopes to acquire (*h*). Thus, a person may sell goods which he hopes to acquire upon the arrival of a ship.

Such a contract must, however, be distinguished from the mere sale of a chance. Thus a contract for the sale of "tomorrow's catch of fish for £5" is a contract for the sale of a chance, but a contract for the sale of "tomorrow's catch of fish at 1s. per pound" is a contract for the sale of goods.

(3) "Where by a contract of sale the seller purports to effect a *present* sale of *future* goods, the contract operates as an agreement to sell."

In such a case, however, the equitable interest in the goods passes to the buyer as soon as the contract is capable of performance (*i*).

### Goods which have perished.

S. 6. "Where there is a contract for the sale of *specific* goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Thus, if A, a dealer in motor bicycles, contracts to sell to B a particular motor bicycle, the contract is void if, unknown to him, that motor bicycle, had been destroyed by fire when the contract was made. But if A, having in stock motor bicycles of a particular make, merely contracted to sell B a motor bicycle of that make, it would be immaterial that his whole stock had been destroyed when the contract was made, and he would be bound to procure another motor bicycle in order to supply B.

This section applies where part of a specific parcel of goods does not exist at the time of the contract so that the parties are contracting about something which does not exist. Thus it has been held to apply where there was a contract for a parcel of 700 bags of nuts of which 109 bags were not in existence at the time of the contract, so that in fact there was not in existence any parcel of 700 bags (*k*).

S. 7. "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

In a case before the Act (*l*) it was decided that a contract for

(*h*) *Ajello v. Worsley*, [1898] 1 Ch., at p. 280; 67 L. J. Ch. 172.

(*i*) See *Tailby v. Official Receiver*, 13 App. Cas., at p. 546; 58 L. J. Q. B. 75.

(*k*) *Barrow, Lane & Ballard, Ltd. v. Philip Phillips & Co., Ltd.*, [1929] 1 K. B. 574; 98 L. J. K. B. 198.

(*l*) *Howell v. Coupland*, 1 Q. B. D. 258; 46 L. J. Q. B. 147.

the sale of 200 tons of potatoes grown on specific land of the vendor at £2 10s. a ton was a contract for part of a specific crop of potatoes and was therefore subject to the implied condition that the seller should be excused if performance became impossible through the crop perishing without any fault on his part. But in *Re Wait (m)* it was pointed out by Atkin, L.J., that this was not a contract for "specific" goods and would now be covered either by s. 5 (2) of the Act or by the Common Law principles [as to impossibility of performance (n)] retained by s. 61 (2) of the Act (o).

**The price.**—"The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.—Where the price is not so fixed or determined the buyer must pay a reasonable price" [s. 8 (1) (2)].

"Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in default may maintain an action for damages against the party in fault" [s. 9 (1) (2)].

**Conditions and warranties.**—A *condition* is a stipulation "the breach of which may give rise to a right to treat the contract as repudiated" [s. 11 (1) (b)].

A *warranty* is "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated" [s. 62].

Both conditions and warranties are terms of the contract, creating obligations under the contract (p), and must be distinguished from *representations* inducing the contract (q).

(m) [1927] 1 Ch., at p. 681.

(n) *Ante*, pp. 207-213.

(o) *Ante*, p. 686.

(p) See the judgment of Fletcher Moulton, L.J., in *Wallis v. Pratt*, [1910] 2 K. B., at p. 1011.

(q) *Ante*, p. 102. This distinction was firmly made as early as 1603 in the case of *Chandelor v. Lopus* (Cro. Jac. 4), cited with approval by Viscount Haldane, L.C., in *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30, at p. 38; 82 L. J. K. B. 245.

Whether any particular stipulation in a contract of sale is a condition or warranty depends in each case on the construction of the contract, and a stipulation may be a condition though called a warranty in the contract [s. 11 (1) (b)].

Where the subject-matter of a contract of sale is a *specific* existing chattel, a statement as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract (r).

This rule does not apply to a case in which goods are sold by description, when their answering to that description is a condition of the contract (s).

But an affirmation made at the time of the sale of a *specific* thing is only a warranty provided it appears on evidence to have been so intended, i.e., provided that it appears to have been the intention of the party making the affirmation that his affirmation should form part of the contract, and should create a contractual liability in respect of its accuracy (t). In *Coldman v. Hill* (u) the plaintiff bought at an auction sale a heifer described in the catalogue as "unserved". The catalogue and conditions of sale provided that the lots were sold with all "errors of description". At the sale the plaintiff asked both the owner of the heifer and the auctioneer whether they could confirm this description and both replied "Yes", upon which the plaintiff bid for and bought the heifer. The heifer was in fact in calf and died as a result of carrying a calf when too young. It was held that the answers of the owner and auctioneer amounted to an offer of a warranty overriding the conditions of sale and accepted by the bid of the plaintiff, who was entitled to recover damages.

A warranty made *subsequently* to the sale must be supported by some new consideration (w).

A breach of a condition *may*, but does not necessarily, lead to a repudiation of the contract.

For, in the first place, where the contract is subject to any condition to be fulfilled by the seller, the buyer may waive the

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(r) *Harrison v. Knowles & Foster*, [1917] 2 K. B., at p. 610; 86 L. J. K. B. 1490.

(s) *Heilbut, Symons & Co. v. Buckleton*, [1918] A. C., at p. 51. See also *post*, p. 646.

(t) *Heilbut, Symons & Co. v. Buckleton* (*ubi supra*).

(u) [1947] K. B. 554; 63 T. L. R. 81.

(w) *Roscorla v. Thomas*, 3 Q. B. 284; 11 L. J. Q. B. 214

condition, or may elect to treat its breach merely as a breach of warranty [s. 11 (1) (a)].

And, secondly, where a contract of sale is not severable (i.e., does not amount to two or more distinct and separate contracts for distinct goods), and the buyer has accepted the goods or part thereof, or where the contract is for *specific goods, the property in which has passed to the buyer*, the breach of any condition to be fulfilled by the seller can be treated only as a breach of warranty [s. 11 (1) (c)] (x).

This rule does not, however, apply where there has been a breach of s. 12 (1) (*infra*).

Nothing in s. 11 affects the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise [s. 11 (2)].

*Stipulations as to time.*—"Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract" [s. 10 (1)].

"In a contract of sale, 'month' means *prima facie* calendar month" [s. 10 (2)].

*Implied undertakings as to title, etc.* [s. 12].—"In a contract of sale, unless the circumstances of the case are such as to show a different intention, there is—

"(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

"(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

"(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made" (y).

An instance of a different intention being shown by the circumstances of the case exists where goods of an execution debtor are sold by the sheriff, who gives no undertaking as to title (z). Another exists in the case of the sale of forfeited pledges by a

(x) See, however, *Wallis v. Pratt & Haynes*, [1911] A. C. 394; 80 L. J. K. B. 1058; *post*, p. 652.

(y) S. 12.

(z) *Peto v. Blaydes*, 5 Taunt. 567.



pawnbroker, who warrants merely that the goods are forfeited pledges, and that he is not cognisant of any defect of title (a).

There can be no sale of goods which the seller has no right to sell. Hence a breach of the condition that the seller has a right to sell the goods may be treated as a ground for rejecting the goods and not merely as a breach of warranty, although the buyer, in ignorance of the seller's want of title, has "accepted" the goods within the meaning of s. 11 (1) (c), which has no application to a breach of this particular condition (b).

There is a breach by the seller of the condition that he has a right to sell where the goods are packed in tins bearing a label or brand which is an infringement of the registered trade mark of another person who can therefore restrain their sale (c).

**Sale of goods by description [s. 13].**—"Where there is a contract for the sale of goods *by description*, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

The office of a sample is to show the *quality* of goods; the description indicates their *kind* (d). If a man buys goods in reliance entirely upon the description given by the vendor and the description of the goods tendered to him is different in any respect, they are not the goods bargained for, and he is not bound to take them (e): and this is so, even though a condition of the sale provides that the genuineness or authenticity of the goods is not guaranteed (f). But if the goods are of the description bargained for, he must take the risk as to their quality, unless either (i) the sale is by sample; or (ii) there is some other warranty or conditions as to quality; or (iii) they are so adulterated or of so poor a quality as not reasonably to answer to the description, as, e.g., if a man buys an article as gold which consists of gold only to the extent of one carat (g).

Even when an article which is sold by description is sold

(a) *Morley v. Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148.

(b) *Rowland v. Dival*, [1923] 2 K. B. 500; 92 L. J. K. B. 1011.

(c) *Niblett v. Confectioners', etc., Co.*, [1921] 3 K. B. 387; 90 L. J. K. B. 984. *Held*, also, by Bankes and Atkin, L.J.J., that there is a breach of the implied condition that the goods shall be of merchantable quality (see s. 14 (2), *post*, p. 649), and by Atkin, L.J., that there is a breach of the implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(d) *Nichol v. Goddard*, 10 Ex. 191; 28 L. J. Ex. 314.

(e) See *Bower v. Shand*, 2 App. Cas., at p. 480; 46 L. J. Q. B. 561.

(f) *Nicholson & Venn v. Smith Marriott*, 177 L. T. 189.

(g) See *Wicler v. Schilizzi*, 17 C. B., at pp. 624, 625; 25 L. J. C. P. 89.

“with all faults”, that expression means with all faults consistently with its being the article described.

Thus, in *Shepherd v. Kaine* (h), a ship described as “copper fastened” was sold “with all faults”. The ship not being in fact copper fastened, it was held that the vendor was not protected by this stipulation, which meant “with all faults, consistently with its being a copper-fastened vessel”.

So also, in *Munro & Co., Ltd. v. Meyer* (i), it was held that a clause that goods were to be taken “with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration”, applied only to goods within the contract description and not to goods which were so adulterated as not to be marketable under that description.

There may be a sale by description not only when the purchaser has not seen the goods (j) but even when he is buying something that is displayed before him. “A thing is sold by description, though it is specific, so long as it is sold, not merely as the specific thing but as a thing corresponding to a description, e.g., woollen undergarments, a hot-water bottle, a second-hand reaping machine” (k).

*The rule of caveat emptor* [s. 14].—“Subject to the provisions of the Act and of any other statute (l), there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.”

The first part of this sub-section merely reproduces the common law rule that if a man knowingly sells an article for a particular purpose there is an implied condition that it is reasonably

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(h) 5 B. & Ald. 240.

(i) [1980] 2 K. B. 312; 99 L. J. K. B. 703.

(j) *Varley v. Whipp*, [1900] 1 Q. B. 513; 69 L. J. Q. B. 338.

(k) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C., at p. 100; 105 L. J. P. C. 6.

(l) See *post*, p. 651.

fit for that purpose : if, therefore, goods are ordered for a particular purpose which expressly or by implication is made known to the vendor such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment (*m*).

Such a reliance must be affirmatively shown ; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing (*n*).

But it is not necessary that the buyer should rely exclusively and totally on the seller's skill and judgment. Thus, even where goods are manufactured by the seller in accordance with specifications provided by the buyer, there may be reliance on the seller's skill and judgment in the production of something which, being in conformity with the specifications, will be fit for the purpose for which it is supplied.

So, in *Cammell, Laird & Co. v. The Manganese, etc., Co.* (*o*), the respondents contracted to build for the appellants, in accordance with specifications provided by the appellants, a propeller for the purpose of being fitted to and working with a particular engine in a particular ship. A propeller made by the respondents conformed with the specifications but would not work properly with the engine. *Held*, (i) that the contract was for the sale of future goods within s. 5 (1) of the Sale of Goods Act, (ii) that the contract disclosed that the propeller was wanted for a particular purpose, (iii) that the condition of fitness may be implied even where it is only in some respects that the buyer relies on the seller's skill and judgment, (iv) that the buyers had made known to the sellers the purpose for which they required the propeller so as to show that they relied on the seller's skill and judgment in the production of a propeller which, in addition to corresponding with the specifications, should be fit to operate as a propeller with the particular engine and ship.

It is not, however, necessary that the purpose should be expressed in the contract ; it may be sufficient if the seller is informed of the particular purpose (*p*).

Nor is there even any " need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section

(*m*) *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] 2 A. C. 74; 91 L. J. K. B. 501.

(*n*) *Cammell, Laird & Co. v. Manganese, etc., Co.*, [1934] A. C. 402, at p. 423; 103 L. J. K. B. 289.

(*o*) *Ubi supra*.

(*p*) [1924] A. C., at p. 423; *Bristol Tramways, etc., Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831; 79 L. J. K. B. 657.

because it is the only purpose for which anyone would ordinarily want the goods" (q). Accordingly, on the sale of undergarments by a retailer of such goods, there is an implied condition that they are fit to be worn next to the skin (r); on a sale by a chemist of a hot-water bottle there is an implied condition that it is fit for use as such (s); on the sale of food which it is in the course of the vendor's business to supply there is an implied condition that it is fit for human consumption (t). It has, moreover, been held that where goods (e.g., mineral waters) are supplied in bottles, the bottles, as well as the contents, must be reasonably fit for the purpose for which they are required; and in such a case it makes no difference whether the bottles are sold or merely hired to the purchaser, for in either case they are "supplied under a contract of sale" (u).

As to the proviso to this sub-section it must be noted that the mere fact that an article is described in the contract by its trade name (as, e.g., an X motor car) does not make the sale a sale under a trade name unless the buyer specifies it under its trade name in such a way as to indicate that he is satisfied that it will answer his purpose and is not relying on the skill or judgment of the seller: but, if the buyer makes known to the seller his requirements "so as to show that he relies on the seller's skill and judgment", the proviso does not apply merely because the article is ordered under its trade name (x).

It may here be noted that it has been held that, on a contract for work done and materials supplied for a particular purpose, the same condition of fitness may be implied as upon a sale of goods (y).

- (2) "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; *provided that* if the buyer has examined the goods, there shall be

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(q) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85, at p. 99.

(r) *Id.*

(s) *Preist v. Last*, [1908] 2 K. B. 148; 72 L. J. K. B. 657.

(t) See, e.g., *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608; 74 L. J. K. B. 386 (milk containing germs of typhoid fever); *Chapronière v. Mason*, 21 T. L. R. 688 (a bun containing a stone which broke the plaintiff's teeth); *Jackson v. Watson*, [1909] 2 K. B. 193; 78 L. J. K. B. 587 (poisonous tinned salmon).

(u) *Gedding v. Marsh*, [1920] 1 K. B. 668; 89 L. J. K. B. 526.

(x) *Baldry v. Marshall*, [1925] 1 K. B. 260; 94 L. J. K. B. 208.

(y) *Myers & Co. v. Brent Cross, etc., Co.*, [1934] 1 K. B. 46; 108 L. J. K. B. 123.

no implied condition as regards defects which such examination ought to have revealed."

Thus, in the case of *Wren v. Holt* (z), the defendant kept a beerhouse which only sold beer supplied by a particular brewer. This was known to the plaintiff, who went there for the purpose of getting that beer, and was poisoned by arsenic contained in it. The jury found that he did not rely on the skill and judgment of the seller so as to bring himself within the previous sub-section, but that he asked for beer of a particular description. It was accordingly held that there was a sale by description, and therefore an implied condition (which had become a warranty; see s. 11 (1) (c)) that the beer was of a merchantable quality, and that the proviso did not apply, for the defect could not be revealed by examination.

So also, if a purchaser asks for ginger wine of a particular brand and is supplied with a bottle which, owing to a defect, breaks and injures his hand when he pulls the cork, there is a sale by description and a breach of the implied condition (which has become a warranty) that the goods are of merchantable quality (a).

By s. 62 of the Act the term "quality" includes the state or condition of goods. The term "merchantable quality" means that the goods are of such quality and in such condition as to be saleable *under the description mentioned in the contract* (b). Thus dates are not of merchantable quality when they have become submerged in the Thames and so impregnated with sewage that they are useless as dates although of value for distillation into vinegar (c). So also a propeller is not of merchantable quality unless it can be used as a propeller with some vessel; it is immaterial that it can be sold as scrap (d).

The term "merchantable quality" does not, however, cover legal title, nor the legal right to sell, and, if the goods are in themselves of merchantable quality, there is no breach of condition merely because they contain an ingredient which, by reason of the local law, renders them unsaleable in the country in which the vendors know they are intended to be sold (e).

It must particularly be noted that the condition that the goods shall be of *merchantable quality* is not excluded when goods

(z) [1903] 1 K. B. 610; 72 L. J. K. B. 340.

(a) *Morell v. Fitch & Gibbons*, [1928] 2 K. B. 636; 97 L. J. K. B. 812.

(b) *Bristol Tramways, etc., Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B., at p. 841.

(c) *Asfar & Co. v. Blundell*, [1896] 1 Q. B. 123.

(d) *Cammell, Laird & Co. v. Manganese, etc., Co.*, [1934] A. C., at p. 480.

(e) *Sumner, Permain & Co. v. Webb*, [1922] 1 K. B. 55; 91 L. J. K. B. 228; distinguishing *Niblett's Case* (*ante*, p. 646) on the ground that there the packing of the goods was part of their "state" or "condition" and rendered them unsaleable anywhere.

are sold under a patent or trade name. So even if a man buys a patent article under its patent name, although he cannot complain because it is not fit for the purpose for which he bought it, he can do so, if through defects in its material or workmanship it is not fit for anything (f) as, e.g., if being a propeller, it is not fit for use in *any* ship (g).

The proviso to the sub-section does not apply to latent defects but only to those which examination ought to have revealed (h). For the proviso to apply, it is not sufficient that the buyer should have had an opportunity of examining the goods, he must have actually examined them. But, if he inspect goods in cases or barrels, which he does not take the trouble to have opened, he cannot say that he has not examined them (i).

(8) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (j).

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

*Sale by sample* [s. 15].—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample, there are implied *conditions* (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Goods are not in accordance with the sample if they require any process, however simple, to turn them into any article which will be in accordance with the sample (k).

Apart from the Sale of Goods Act, warranties are in certain cases implied by statute. Thus by s. 17 of the *Merchandise Marks Act*, 1887, it is provided that on the sale or in the contract for the sale of any goods to which a trade mark, or mark or trade description has been applied, the vendor shall be deemed

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(f) See *Bristol Tramways Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B., at p. 848.

(g) [1984] A. C., at p. 430.

(h) *Ibid.*

(i) *Thornett v. Fehr & Beers*, [1919] 1 K. B. 486; 88 L. J. K. B. 684.

(j) S. 14 (3).

(k) *E. & S. Ruben v. Faire Brothers & Co.*, [1949] 1 K. B. 254.

to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee. Various warranties are also implied under the *Fertilizers and Feeding Stuffs Act*, 1926, and the *Food and Drugs (Adulteration) Act*, 1928 (consolidating the Sale of Food and Drugs Acts).

*Exclusion of conditions and warranties.*—In the absence of any statutory provision to the contrary, any implied warranty or condition may be excluded by express agreement (l).

But an agreement excluding a warranty does not exclude a condition, and for this purpose a condition always remains a condition (m).

Thus, in *Wallis v. Pratt & Haynes* (n), A sold to B seed described as "common English sainfoin" on the terms that "sellers give no warranty expressed or implied as to growth, description or any other matters". The seed was in fact giant sainfoin, a different seed. The purchasers accepted and resold the seed so that they only had the remedies applicable to a breach of warranty (see s. 11 (1) (c)). It was held that, since the description was a condition and not a warranty, the sellers were not protected by the fact that the terms of the contract excluded any warranty.

And an agreement excluding implied conditions and warranties does not exempt a vendor from liability under an express term of the contract.

So, in *Andrews v. Singer & Co., Ltd.* (o), the defendants sold a car as a "new Singer car". Held, that this description was an express term of the contract and was not affected by a term of the contract which excluded all implied "warranties, conditions and liabilities".

#### SUB-SECTION 2.—*Effects of the Contract*

**Transfer of property as between seller and buyer.**—As has been already stated, there is a sale only when the property, i.e., the ownership—of goods is transferred to the purchaser (p). The

(l) See, for example, *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K. B. 394; 108 L. J. K. B. 780.

(m) *Cammell, Laird & Co. v. The Manganese, etc., Co.*, [1934] A. C., at pp 431, 432.

(n) [1911] A. C. 394; 80 L. J. K. B. 1058.

(o) [1934] 1 K. B. 17; 103 L. J. K. B. 90.

(p) *Ante*, p. 637.

question whether the property has been transferred is often of great importance, particularly when the person who has the *possession* of the goods becomes bankrupt, as *e.g.*, where goods which are the subject of a contract of sale have remained in the possession of a vendor who has been paid for them, or where they have passed into the possession of a purchaser who has not paid for them. If in either case the bankrupt has the property in the goods, they will vest in his trustee for the benefit of the creditors, and the purchaser or vendor will merely rank as a creditor: but if the bankrupt has not the property in the goods they can, subject to certain exceptions (*q*), be claimed by the owner.

The following rules as to the transfer of property are laid down by the Act:—

**S. 16.**—“Where there is a contract for the sale of *unascertained goods* no property in the goods is transferred to the buyer unless and until the goods are ascertained.”

Accordingly, a purchaser of a given number of bales or barrels out of a larger bulk does not acquire the property in them until they have been separated and appropriated to the contract (*r*).

Thus, in *Laurie v. Dudin & Sons* (*s*), the defendants were warehousemen, who held 618 quarters of maize belonging to A. Two hundred quarters were sold by A. to W. and by W. to the plaintiffs, who obtained a delivery order for the maize and lodged it with the defendants. *Held*, that the mere giving of the delivery order did not pass the property in the 200 quarters of maize, which remained unascertained until separated from the bulk.

**S. 17.**—“Where there is a contract for the sale of *specific or ascertained goods* the property in them is transferred to the buyer *at such time as the parties to the contract intend it to be transferred*. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case” (*t*).

**S. 18.**—*Unless a different intention appears* (*u*), the following are rules for ascertaining the intention of the parties:—

(*q*) As, *e.g.*, if they are in the “reputed ownership” of the bankrupt (*post*, p. 662).

(*r*) See *Dixon v. Yates*, 5 B. & Ad. 812; 2 L. J. K. B. 198; *Campbell v. Mersey Docks*, 14 C. B. (N.S.), at p. 414. As to unascertained goods, see also *ante*, p. 641.

(*s*) [1926] 1 K. B. 228; 95 L. J. K. B. 191.

(*t*) For a case in which these matters were discussed, see *Eldon (Lord) v. Hedley Brothers*, [1985] 2 K. B. 1; 104 L. J. K. B. 334.

(*u*) See, *e.g.*, *Underwood, Ltd. v. Burgh Castle, etc., Syndicate* (*infra*).



Rule 1.—“Where there is an *unconditional contract* for the sale of *specific goods* (x) in a *deliverable state*, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.”

The term “*deliverable state*” means in such a state that the buyer would, *under the contract*, be bound to take delivery of them (s. 62 (4)). Thus, in the case of *Kursell v. Timber Operators, etc.* (y), it was also held that the timber was not in a deliverable state until the purchaser had severed it. So also, where the subject of the contract was an engine, to be delivered free on rail in London, which, before it could be delivered, had to be detached from a concrete bed and dismantled, it was held that the property did not pass until this had been done (z).

Rule 2.—“Where there is a contract for the sale of *specific goods*, and the seller is bound to do something to the goods, *for the purpose of putting them into a deliverable state*, the property does not pass until such thing be done *and* the buyer has notice thereof” (a).

Rule 3.—“Where there is a contract for the sale of *specific goods in a deliverable state*, but the seller is bound to weigh, measure, test, or do some other act with reference to the goods, *for the purpose of ascertaining the price*, the property does not pass until such act or thing be done *and* the buyer has notice thereof” (b).

Rule 4.—“When goods are delivered to the buyer on approval or ‘on sale or return’, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

Thus, in *Kirkham v. Attenborough* (c), the plaintiff was a jeweller, and was induced by false pretences made by W. to send goods to him on sale or return. W. pawned the goods to the

(x) As to “specific goods”, see *ante*, p. 641.

(y) *Ante*, p. 641.

(z) *Underwood, Ltd., v. Burgh Castle, etc., Syndicate*, [1922] 1 K. B. 348; 91 L. J. K. B. 355.

(a) For an example before the Act, see *Aoraman v. Morrice*, 8 C. B. 449; 19 L. J. C. P. 57 (contract for the sale of felled trees, which had to be trimmed before delivery).

(b) For examples before the Act, see *Hanson v. Meyer*, 6 East 614 (contract for the sale of all the starch lying at a warehouse at so much per cwt.); *Zagury v. Furnell*, 2 Camp. 239 (contract for the sale of bales of skins at so much per dozen skins). Compare *Nanka-Bruce v. Commonwealth Trust*, [1926] A. C. 77; 94 L. J. P. C. 169, where it was held that a provision that the weight of goods should be tested was not a condition precedent to the passing of the property.

(c) [1897] 1 K. B. 201; 66 L. J. Q. B. 119; followed in *London Jewellers, Ltd. v. Attenborough*, [1934] 2 K. B. 206; 108 L. J. K. B. 429.

defendant. *Held*, that the property had passed to the defendant, and that the goods could not be recovered from him by the plaintiff.

But it is otherwise where 'a different intention appears' from the terms of the contract—for instance, where goods were delivered on the terms of the following memorandum: 'On approbation. On sale for cash only or return. . . . Goods had on approbation or on sale or return remain the property of S. W. until such goods are settled for or charged' (d).

- (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

What is a reasonable time is a question of fact."

Rule 5.—(i) "Where there is a contract for the sale of *unascertained* or *future* goods *by description*, and goods of that description (e), and in a deliverable state, are *unconditionally appropriated* to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." A buyer may impliedly assent to the appropriation as, e.g., by ordering an article and leaving it to the seller to appropriate to him an article of the description ordered (f).

(ii) "Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

S. 19.—"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions are fulfilled (g).

(d) *Weiner v. Gill*, [1906] 2 K. B. 574; 75 L. J. K. B. 916; see also *Kempler v. Bravingtons*, 138 L. T. 680.

(e) See *Vigers v. Sanderson*, [1901] 1 K. B. 608; 70 L. J. K. B. 888.

(f) *Furby v. Hoby*, 68 T. L. R. 196; [1947] 1 All E. R. 286, D. C.

(g) S. 19 (1). For an example, see *Munro & Co. v. Meyer*, [1980] 2 K. B. 312; 99 L. J. K. B. 703.

“Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal (h). ”

“Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him ” (i).

**Risk [s. 20].**—“Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer’s risk *whether delivery has been made or not*. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred *but for such fault*. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party ” (j).

The general rule as to the time at which the risk passes may be varied by usage (k), e.g., by a usage in a particular trade that when goods are ordered on approval the person ordering them is liable for loss while they are in his hands on approval (l).

The risk may pass although the property has not passed. Thus, in a contract for the sale of goods forming portion of a larger quantity in the possession of a third party the risk passes as soon as the third party undertakes to the purchaser to deliver to him that portion out of the bulk (m).

**Transfer of title.**—“At Common Law a person in possession of goods could not confer on another, either by sale or pledge, any better title than he himself had ” (n). To this general rule there were, however, the following exceptions (o) :—

i. Sales in market overt.

ii. Sales or pledges by a person who had a voidable title.

But a person who has no title at all against the true

(h) S. 19 (2).

(i) S. 19 (3).

(j) See also s. 32 (2) (3), and s. 33, *post*, p. 665, as to risks in transit.

(k) See s. 55, *ante*, p. 636.

(l) *Bevington v. Dale*, 7 Com. Cas. 112.

(m) *Sterns, Ltd. v. Vickers, Ltd.*, [1928] 1 K. B. 78; 92 L. J. K. B. 331.

(n) *Cole v. North Western Bank*, L. R. 10 C. P., at p. 363; 44 L. J. C. P. 233.

(o) *Id.*, and see *Nanka-Bruce v. Commonwealth Trust*, [1926] A. C., at p. 79; 94 L. J. P. C. 169.

owner—*e.g.*, a thief or a finder (*p*), or person who has acquired goods under a *void* contract (*q*)—can give no title except by sale in market overt.

- iii. Sales or pledges by a person who had authority from the true owner, or who was held out as having authority, so that the owner was estopped from denying his authority (*r*).
- iv. Dispositions by a person who by law had some special power of dealing with the goods, as, *e.g.*, the power of a landlord to sell goods distrained, or the power of a pawn-broker to sell unredeemed pledges.

The rule and its exceptions are now made statutory by ss. 21–25 of the Sale of Goods Act and ss. 1–10 of the Factors Act, 1889.

By s. 21, “Subject to the provisions of this Act” (*i.e.*, ss. 22–25, *infra*), “where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell (*s*).”

“Provided also that nothing in this Act shall affect—

- “(a) The provisions of the Factors Acts or any enactment enabling the *apparent* owner of goods to dispose of them as if he were the true owner thereof;
- “(b) The validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction” (*t*).

S. 22.—“Where goods are sold *in market overt*, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.” But

(*p*) *Farquharson Brothers v. King & Co.*, [1902] A. C., at pp. 335–336; 71 L. J. K. B. 687.

(*q*) *Cundy v. Lindsay*, 3 App. Cas. 459; 47 L. J. Q. B. 481. Compare however, *Phillips v. Brooks, Ltd.*, [1919] 2 K. B. 249; 88 L. J. K. B. 958; *ante*, p. 121.

(*r*) It is not sufficient that the vendor by his conduct enabled the seller to dispose of the goods; it must be shown that he actually held out the seller to the purchaser as his agent. *Farquharson v. King* (*ubi supra*).

(*s*) S. 21 (1). For a full discussion of this sub-section, see *Heap v. Motorists', etc., Agency*, [1928] 1 K. B. 577; 92 L. J. K. B. 558.

(*t*) S. 21 (2). As to a sale by a bailiff under a warrant of execution, see *Goodlock v. Cousins*, [1897] 1 Q. B. 558; 66 L. J. Q. B. 360.

“nothing in this section shall affect the law relating to the sale of horses” (u).

By s. 62 (2) a thing is deemed to be done in good faith when it is in fact done honestly, whether it be done negligently or not.

- \* The expression “market overt” applies only to “an open, public, and legally constituted market” (x). In the country the market place, or spot of ground set apart by custom for the sale of particular goods, is the only market overt; but by the custom of London every open shop in the City of London is a market overt for such things as by the trade of the owner are put there for sale by him (y). But (i) the sale must be by the shopkeeper, and not to him (z); (ii) it must be an open sale, not in a part of the shop which is not “open”, or in a back room or show-room to which customers are admitted only by special invitation (a); (iii) the whole transaction must be in the shop, so that on a sale by sample it is not sufficient for the contract to be made in the shop; the goods themselves must be exposed there (b). Whether or not an auction room is a shop is in each case a question of fact (c).

S. 23.—“Where the seller of goods has a *voidable* title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title.”

It must be noted that this section applies only to contracts which are voidable, that is to say, which are valid until rescinded, as, e.g., contracts which are induced by misrepresentation. It

(u) S. 22 (2). This section does not apply to Scotland (*id.*, sub-s. 3). Nor do the rules of market overt apply to Wales. The sale of horses is governed by regulations laid down by 2 & 3 Phil. & Mar. c. 7, and 31 Eliz. c. 12, which in effect take horses out of the rule as to market overt. There is no market overt for ships (*Hooper v. Gumm*, L. R. 2 Ch., at p. 290; 36 L. J. Ch., at p. 805).

(x) *Lee v. Bayes*, 18 C. B., at p. 601; 25 L. J. C. P. 249. It is not confined to markets established by grant or prescription but may rest upon a market constituted upon by statute; *Bishopsgate Motor Finance Corporation, Ltd. v. Transport Brakes, Ltd.*, [1949] 1 K. B. 322.

(y) For a full discussion of the rules relating to market overt, see *Hargreave v. Spink*, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318, and the judgment of Scrutton. J., in *Clayton v. Le Roy*, [1911] 2 K. B. 1081; 81 L. J. K. B. 39 (reversed on another ground by the Court of Appeal).

(z) *Hargreave v. Spink* (*ubi supra*); *Ardath Tobacco Co. v. Ocker*, 47 T. L. R. 177.

(a) See cases cited in n. (y).

(b) *Crans v. London Docks Co.*, 5 B. & S. 318; 33 L. J. Q. B. 224.

(c) See *Clayton v. Le Roy* (*ubi supra*).

does not apply where there is no contract, as, *e.g.*, where a contract is void through mistake (*d*).

If a buyer has acquired a good title to the goods, he can pass that good title to a purchaser who has notice that the goods were fraudulently obtained from the vendor, but was not a *party* to the fraud (*e*).

S. 24.—“Where goods have been *stolen* and the offender is prosecuted to conviction, the property in the goods so stolen *reverts* in the person who was the owner of the goods, or his representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise” (*f*). But “where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender” (*g*).

By a sale in market overt the property passes to the purchaser, who, until by the conviction it *reverts* in the original owner, is the owner of the goods, and is therefore not liable to any action in respect of his dealings with them during the intervening time (*h*). By s. 6 of the Criminal Appeal Act, 1907, the reversion is suspended (unless the Court otherwise directs) for ten days after the conviction and also pending any appeal.

S. 25.—“Where a person, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by any mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, [*or under any agreement for sale, pledge, or other disposition thereof* (*i*)] to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same” (*k*).

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(*d*) Compare *Cundy v. Lindsay* with *Phillips v. Brooks*, *ante*, pp. 120, 121. See also *Kirkham v. Attenborough* (*ante*, p. 654); *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 468; 80 L. J. K. B. 425.

(*e*) *Peirce v. London, etc., Repository*, [1922] W. N. 170.

(*f*) S. 24 (1).

(*g*) S. 24 (2), re-enacted by s. 45 of the Larceny Act, 1916, with the alteration of the word “larceny” to “stealing”.

(*h*) *Horwood v. Smith*, 2 T. R. 750.

(*i*) These words in this and the next sub-section are contained in ss. 8 and 9 of the Factors Act, 1889, which are otherwise in the same language and were not repealed by the Sale of Goods Act.

(*k*) S. 25 (1).

“Where a person, having *bought or agreed to buy* goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, [*or under any agreement for sale, pledge, or other disposition thereof,*] to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner” (l).

A conditional agreement to buy is within this sub-section, e.g., an agreement by A to buy goods subject to the approval of his solicitor (m).

By s. 62 the term “document of title” has the same meaning as in the Factors Act, 1889 (n).

The words “mercantile agent” in the previous section have the same meaning as in the *Factors Act*, 1889 (o), which amended and consolidated the Factors Acts of 1828, 1825, and 1842. At Common Law, as already pointed out, the owner of goods might be bound by a sale made by a person whom he had held out as having authority to sell them. But it was held that the mere fact that an agent was entrusted with the possession of goods or documents of title to goods did not amount to a holding out so as to enable him to dispose of the goods in a manner contrary to his actual instructions. This, however, is no longer the law with regard to *mercantile* agents, nor, as has been seen, with regard to sellers in possession after sale and buyers who have obtained possession.

By the *Factors Act*, 1889 (p), a “mercantile agent” is defined as a “mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods” (q). The expression “*document of title*” includes any bill of lading, dock warrant,

(l) S. 25 (2).

(m) *Marten v. Whale*, [1917] 2 K. B. 480; 86 L. J. K. B. 1805.

(n) See *infra*.

(o) S. 25 (8).

(p) S. 1 (1) (4).

(q) As to who is a mercantile agent, see *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K. B. 50; 76 L. J. K. B. 806; *Weiner v. Harris*, [1910] 1 K. B. 285; 79 L. J. K. B. 342 (overruling *Hastings v. Pearson*, [1898] 1 Q. B. 62); *Lowther v. Harris*, [1927] 1 K. B. 398; 96 L. J. K. B. 170.

warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented.

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same (r). This rule applies even though the consent of the owner has determined, provided that the person taking under the disposition has not at the time thereof notice of its determination (s).

An agent may be a mercantile agent although he acts for only one principal (t): but the Act does not apply to a mere servant or shopman (u).

If a mercantile agent is in fact in possession of goods with the consent of the owner it is, for the purposes of the Act, immaterial that the consent was obtained by fraud or false pretences, or even by larceny by a trick, unless the trick was of such a nature that the consent was merely apparent and not real, as, for instance, if the owner was deceived as to the identity of the person with whom he was dealing (w).

Where, however, a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee acquires no further right to

(r) *Id.*, s. 2 (1). See *Oppenheimer v. Frazer & Wyatt* (*ubi supra*); *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221; 77 L. J. K. B. 209. A person is in "possession", though the actual custody of the goods, etc., is held by some other person, subject to his control or for him or on his behalf: s. 1 (2).

(s) S. 2 (2).

(t) *Lowther v. Harris* (*ubi supra*).

(u) *Ibid.*

(w) *Folkes v. King*, [1928] 1 K. B. 282; 92 L. J. K. B. 125. That is to say, in the case of larceny by a trick, a mercantile agent may, for the purposes of this Act, be in possession with the consent of the owner, although, for the purposes of the criminal law, he is in possession against the will of the owner. It has been held, however, that in the case of an agent who is not a mercantile agent this rule does not apply to s. 21 (1) of the Sale of Goods Act: see *Heap v. Motorists', etc., Agency*, [1928] 1 K. B. 577; 92 L. J. K. B. 553.



the goods than could have been enforced by the pledgor at the time of the pledge (y).

*Effect of writs of execution.*—A writ of execution against goods binds the property in the goods from the time when it is delivered to the sheriff to be executed, but does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless at the time when he acquired his title he had notice that such writ or any other writ by virtue of which the goods might be seized had been delivered to, and remained unexecuted in the hands of, the sheriff (z).

In *bankruptcy* the title of the trustee *relates back* to the first act of bankruptcy committed by the bankrupt within the three months preceding the date of the presentation of the petition (a). But a sale or transfer of property by a person who subsequently becomes bankrupt is not avoided by the bankruptcy if made (i) before the receiving order; and (ii) before the purchaser had notice of any available act of bankruptcy (b). Goods which by the consent of the true owner are in the possession of a vendor or purchaser in his trade or business, and under such circumstances that he is the “reputed owner” thereof, will, however, pass to the trustee in bankruptcy (c). A purchase from a bankrupt of goods acquired by him after his adjudication is valid against the trustee in bankruptcy if made *bona fide* and for value and before any intervention by the trustee (d).

#### SUB-SECTION 3.—*Performance of the Contract*

S. 27.—“It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them *in accordance with the terms of the contract of sale.*”

S. 28.—“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

By s. 62 “delivery” means “voluntary transfer of possession from one person to another”. Delivery may be actual or constructive (e).<sup>a</sup>

(y) Factors Act, 1889, s. 4.

(z) Sale of Goods Act, 1893, s. 26.

(a) Bankruptcy Act, 1914, s. 37; and as to fraudulent preferences, see s. 44.

(b) Bankruptcy Act, 1914, s. 45.

(c) Bankruptcy Act, 1914, s. 38 (c).

(d) *Id.*, s. 47. See also s. 4 of the Bankruptcy Act, 1926.

(e) As to constructive delivery, see *Mills v. Charlesworth*, 25 Q. B. D., at p. 425.

S. 29.—“ Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller’s place of business, if he have one, and, if not, his residence: provided that if the contract be for the sale of *specific goods*, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.—Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods ” (f).

Where, under a contract of sale the seller of goods is directed to deliver them at the buyer’s premises, he discharges his obligations if he delivers them there without negligence to a person apparently having authority to receive them (g).

Where the seller is bound to send goods to the buyer, but no time for sending is fixed, he must send within a reasonable time, which is a question of fact (h), and, unless otherwise agreed, must bear the expenses of putting the goods in a deliverable state (i). Demand or tender of delivery must be at a reasonable hour, which is a question of fact (k).

*Delivery of wrong quantity* [s. 30].—“ Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate ” (l).

“ Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole: if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate ” (m).

“ Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which

(f) S. 29 (1) (8).

(g) *Galbraith & Grant, Ltd. v. Block*, [1922] 2 K. B. 155; 91 L. J. K. B. 649.

(h) S. 29 (2).

(i) S. 29 (5).

(k) S. 29 (4).

(l) S. 30 (1).

(m) S. 30 (2).

are in accordance with the contract and reject the rest, or he may reject the whole " (n).

The term "mixed with" includes "accompanied by", and "description" may include the method of packing (o).

\* But "the provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties" (p).

The Court will not take into consideration trivial or "microscopic" variations from the quantity contracted for; and a vendor can, moreover, usually protect himself by contracting to sell "about" so many tons, or so many tons "more or less" (q).

*Instalment deliveries* [s. 31].—"Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments" (r).

"Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated" (s).

In a recent case it was held that the main tests to be considered in applying this sub-section are "first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that the breach will be repeated" (t).

A clause in a contract that "each delivery or shipment shall be treated as a separate contract and that the failure to give or take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" cannot defeat the right to repudiate which is given by this sub-section (u).

(n) S. 30 (3), and see *Green v. Arcos*, 47 T. L. R. 336.

(o) *Re Moore & Landauer*, [1921] 2 K. B. 519; 90 L. J. K. B. 731.

(p) S. 30 (4).

(q) *See Arcos, Ltd. v. Ronaasen*, [1933] A. C., at p. 479; 102 L. J. K. B. 346.

(r) S. 31 (1).

(s) S. 31 (2). See *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 453; 74 L. J. K. B. 688; *Payzu, Ltd. v. Saunders*, [1919] 2 K. B. 581.

(t) *Maple Flock Co. v. Universal Furniture Products, Ltd.*, [1934] 1 K. B., at p. 157; 103 L. J. K. B. 513 (reviewing the authorities).

(u) *Munro & Co. v. Meyer*, [1930] 2 K. B. 312; 99 L. J. K. B. 703.

*Delivery to a carrier* [s. 32].—"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer.—Unless otherwise authorised by the buyer, the seller must make such contract with the carrier *on behalf of the buyer* as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages" (x).

The ordinary rules as to delivery to a carrier under a contract of sale are that (i) it is a delivery to the buyer which, provided that the goods are in conformity with the contract, passes to him the property and the risk if they have not already passed; the carrier is not, however, the agent of the buyer to accept the goods: (ii) the contract of carriage is made with the carrier by the vendor as agent for the purchaser: (iii) the carrier is the agent for the purchaser, who is therefore the proper person to sue him for non-delivery of or damage to the goods. But these are only *prima facie* rules, which may be varied in many ways. Thus, the goods may be delivered to a carrier as agent for the vendor, or the vendor may expressly contract to deliver the goods at a particular place, in which case his contract is not performed until the goods have reached their destination (y).

"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit" (z).

This sub-section does not apply to c. i. f. contracts, that is to say, where goods are sold at a price to cover cost, insurance and freight. Under a c. i. f. contract the vendor, in the absence of any special provision to the contrary, is bound (i) to make out an invoice of the goods sold; (ii) to ship at the port of shipment goods of the description contained in the contract; (iii) to procure *on shipment* a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; (iv) to arrange for an insurance upon the terms current in the

(x) S. 32 (1) (2).

(y) See *Dunlop v. Lambert*, 6 Cl. & Fin. 603; *Calcutta Co. v. De Mattos*, 82 L. J. Q. B. 322; and as to delivery to a carrier as agent for the vendor, s. 19 (2), *ante*, p. 656.

(z) S. 32 (3).

trade which will be available for the benefit of the buyer; (v) with all reasonable dispatch to send forward and tender to the buyer these shipping documents—namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of the price (a). Hence the contract is for the sale of goods to be performed by the delivery of documents (b). "All that the buyer can call for is delivery of the customary documents. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent" (c). The vendor can therefore validly tender the documents although at the time of the tender the goods have been lost (d).

Nor does the sub-section apply to an "ex ship" contract. "In the case of a sale 'ex ship' the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for the delivery of the goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the ship-owner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods" (e).

But the sub-section applies ordinarily to f.o.b. (free on board) contracts, under which the seller is bound to deliver the goods on board ship at his own expense, the risk thereafter passing to the buyer (f).

**Risk of goods in transit [s. 33].**—"Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

**Buyer's right to examine the goods [s. 34].**—"Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity for examining them for the purpose of ascertaining whether they are in conformity with the contract.—Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the

(a) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A. C., at pp. 155, 156; 89 L. J. K. B. 227; *Hansson v. Hamel & Horley*, [1922] 2 A. C. 36; 91 L. J. K. B. 438; *Finlay (James) & Co. v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1929] 1 K. B. 400; 98 L. J. K. B. 251.

(b) *Karberg v. Blythe, Green & Co.*, [1916] 1 K. B., at pp. 510, 514.

(c) *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198, at p. 202; 88 L. J. K. B. 402.

(d) *Ibid.*

(e) *Yangtze Insurance Association v. Lukmanjee*, [1918] A. C., at p. 589; 87 L. J. P. C. 111.

(f) *Inglis v. Stock*, 10 App. Cas. 263; 54 L. J. Q. B. 542.

buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract" (g).

*Acceptance* [s. 35].—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The acceptance to which this section refers is acceptance of the goods *in performance of the contract* as distinct from the acceptance in recognition of the contract which is required by s. 4. Acceptance in this sense is material only when there is a right to reject the goods as not being in accordance with the contract.

Where a buyer resells some of the goods and delivers them to the sub-purchaser he does an act which is inconsistent with the ownership of the original seller, and accordingly loses his right of rejecting, even though he had no knowledge that the goods were not in accordance with the contract, and the reasonable time for examining them which is allowed by s. 34 had not expired (h).

Where, however, sellers deliver the goods they contracted to sell mixed with goods of a different description not included in the contract, the buyers may reject the whole under s. 30 (3) of the Act although they have accepted that part of the goods which is in accordance with the contract (i).

Before there can be an acceptance the buyer must have actual or constructive delivery of the goods (j).

*Return of rejected goods* [s. 36].—"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, *having the right so to do*, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

*Liability of buyer for not taking delivery* [s. 37].—"When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take

(g) S. 34 (1) (2).

(h) *Hardy & Co. v. Hillerns & Fowler*, [1928] 2 K. B. 490; 92 L. J. K. B. 980; see also *Benaïm & Co. v. Debono*, [1924] A. C. 514; 93 L. J. P. C. 138.

(i) *London Plywood, etc., Co. v. Nastic Oak, etc., Co., Ltd.*, [1939] 2 K. B. 343; 108 L. J. K. B. 587.

(j) *Ruben v. Faire Brothers*, [1949] 1 K. B. 264.

delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

**SUB-SECTION 4.—Rights of Unpaid Seller against the Goods**

**The unpaid seller [s. 38].**—The seller of goods is deemed to be an unpaid seller within the meaning of the Act

- (a) when the whole of the price has not been paid or tendered;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment (*k*) and the condition has not been fulfilled by reason of the dishonour of the instrument or otherwise.

In this part of the Act the term "seller" includes any person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid or is responsible for the price.

**Unpaid seller's rights [s. 39].**—Irrespective of the rights of an unpaid seller by action, he has also the following rights *against the goods* :—

1. If the property in the goods has passed to the buyer—

- (a) a lien on the goods *while he is in possession* of them;
- (b) in case of the *insolvency* of the buyer a right of *stopping the goods in transitu after he has parted with the possession*;
- (c) a right of resale as limited by the Act.

2. If the property has not passed he has a right of withholding delivery.

**Lien [s. 41].**—The unpaid seller's lien is a right to retain possession of the goods until payment or tender of the price. It arises—

- "(a) Where the goods have been sold without any stipulation as to credit;
- (b) When the goods have been sold on credit but the term of credit has expired;
- (c) When the buyer becomes insolvent.

The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee for the buyer."

**Part delivery [s. 42].**—"Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the

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(*k*) See *ante*, pp. 216, 217.

remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien."

*Termination of lien* [s. 43].—The lien is lost by the unpaid seller—

- " (a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods (1);
- (b) When the buyer or his agent lawfully obtains possession of the goods;
- (c) By waiver thereof."

But it is not lost merely by obtaining judgment for the price of the goods.

*Stoppage in transitu* [ss. 44, 45].—After the unpaid seller has parted with the possession of the goods, he nevertheless has the right, if the buyer becomes insolvent, of resuming possession of them so long as they are in course of transit to the buyer, and of then retaining them until payment or tender of the price. The following rules are laid down by the Act :—

1. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

2. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

3. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

Goods are *in transitu* while, for the purposes of transmission under the contract, they are in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired, possession. If the vendor has reserved the right of disposal, the carrier is his agent, and he still has possession (m). If the carrier has agreed to hold them exclusively for the buyer, he is the agent of the buyer, who thus has possession (sub-s. 3 above). To be *in transitu* the goods must

(1) As to reserving the right of disposal, see s. 19, *ante*, p. 655.

(m) *Schotsmans v. Lancashire and Yorkshire Ry.*, L. R. 2 Ch., at p. 385; 36 L. J. Ch. 361.



be in the hands of the carrier *as such*, and for the purposes of the transit (n).

The goods need not be in motion; it is sufficient if they are in any place of deposit connected with the transmission (o).

The words "appointed destination" mean the destination appointed between seller and buyer *by the contract*, on reaching which the goods will not be set in motion again without new orders from the purchaser (p).

Thus, in *Ex p. Miles* (q), a London commission agent was employed by a firm at Kingston, Jamaica, to buy goods for them in England. The agent bought as principal and the goods were to be paid for by him. The vendors, however, knew that the goods were for the Jamaica firm. The agent directed the vendors to mark the goods "E. M., Kingston, Jamaica", and to send them to D. & Co., who were shipping agents at Southampton, to be forwarded as might be directed by the purchaser. *Held*, that as between the vendor and purchaser the destination of the goods was D. & Co., and the transit ended as soon as the goods reached them.

On the other hand, in *Bethell v. Clark* (r), where by the directions of the purchaser goods were consigned "to the Darling Downs, to Melbourne", it was held that the transit was not at an end until the goods reached Melbourne.

4. If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

5. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier, or as agent to the buyer (s).

6. Where the carrier, or other bailee, wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

7. Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

(n) *Lyons v. Hoffnung*, 15 App. Cas., at p. 397; 59 L. J. P. C. 79.

(o) *Kendall v. Marshall, Stevens & Co.*, 11 Q. B. D., at p. 365; 52 L. J. Q. B. 313.

(p) *Ex p. Miles*, 15 Q. B. D. 39; 54 L. J. Q. B. 566.

(q) *Ubi supra*.

(r) 20 Q. B. D. 615; 57 L. J. Q. B. 302. See also *Kemp v. Ismay, Imru & Co.*, 100 L. T. 996.

(s) The test is whether the master is the servant of the owner or of the charterer.

*How stoppage in transitu is effected* [s. 46].—"The unpaid seller may exercise his right of stoppage *in transitu*, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer. When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller" (t).

Where notice is given to a shipowner, it is his duty to transmit it with reasonable diligence to the master of the ship.

*Effect of sub-sale or pledge by buyer* [s. 47].—Subject to s. 25 (2) of the Act (a), "the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

"Provided that, where a *document of title* to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

*Resale* [s. 48].—A contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage *in transitu*. But where an unpaid seller who has exercised either right resells the goods, the buyer acquires a good title as against the original buyer.

Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender

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(t) S. 46 (1) (2).

(u) *Kemp v. Falk*, 7 App. Cas., at p. 585; 52 L. J. Ch. 167.

the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

#### SUB-SECTION 5.—*Actions for Breach of the Contract*

The remedies of the seller, in case of a breach of contract by the buyer, are

1. If the property in the goods has passed to the buyer who refuses to pay for them—an action for the price;
2. If the buyer neglects or refuses to accept and pay for the goods—an action for damages for non-acceptance.

The remedies of the buyer, in case of a breach of contract by the seller, are

1. If the seller wrongfully neglects or refuses to deliver the goods—an action for damages for non-delivery;
2. In the case of specific or ascertained goods—an action for specific performance;
3. In the case of a breach of warranty—a right of set-off or an action for damages for breach of warranty;
4. If the property in the goods has passed to him and he is entitled to immediate possession of them—an action for conversion or detinue.

*Action for price* [s. 49].—“Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods” (y).

“Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract” (z).

*Damages for non-acceptance or non-delivery* [ss. 50, 51].—Where there is a wrongful neglect or refusal by the buyer to accept and pay for the goods, or by the seller to deliver the goods

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(y) S. 49 (1).

(z) S. 49 (2).

to the buyer, the other party may maintain an action for non-acceptance or non-delivery.

The measure of damages is "the estimated loss directly and naturally resulting, in the ordinary course of events", from the buyer's or seller's breach of contract.

Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or delivered, or, if no time was fixed, then at the time of the refusal to accept or deliver (a).

This rule as to the measure of damages does not apply to an anticipatory breach by repudiation of the contract before the time of performance. In such a case the damages must be fixed by reference to the time of performance, subject, however, to abatement, if there were any circumstances which would have afforded a reasonable opportunity of mitigating the loss (b).

Where the goods cannot be replaced on the market the measure of damages is the profit which the purchaser would have made if the contract had been performed (c).

*Specific performance* [s. 52].—"In any action for breach of contract to deliver *specific or ascertained* goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment."

In the case of *Re Wait* (d), where the contract was for 500 tons out of a consignment of wheat, it was said by Atkin, L.J.: "It is not easy to discover the reason for adding [to the word 'specific'] the words 'or ascertained'. It is, however, clear that 'specific goods' bear the meaning assigned to them in the definition clause [s. 62], 'goods identified and agreed upon at the time a contract of sale is made'. 'Ascertained' probably means identified in accordance with the agreement after the time a contract of sale is made, and I shall assume that to be the meaning. It seems to me beyond dispute that at the date of this

(a) ss. 50 (buyer), 51 (seller).

(b) *Millett v. Van Heek & Co.*, [1921] 2 K. B. 369; 90 L. J. K. B. 671.

(c) *J. Leaveney & Co., Ltd. v. G. H. Hirst & Co., Ltd.*, [1944] 1 K. B. 24; 113 L. J. K. B. 299.

(d) [1927] 1 Ch. 60; 96 L. J. Ch. 179.

contract there were no goods identified and agreed upon; and I think it was equally clear that at no time were there any goods ascertained".

*Remedy for breach of warranty* [s. 53].—"Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty (e), the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price, (b) maintain an action against the seller for damages for the breach of warranty.

"The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

"In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty.

"The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage" (f).

*Interest and special damages* [s. 54].—"Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

The general rules as to damages have already been discussed (g).

An important case on the remoteness of damage in an action upon the sale of goods is that of *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.* (h). In that case the defendants contracted to sell sulphuric acid free from arsenic. The purchasers, who did not make known the purpose for which they required it, used the acid to make glucose, which they sold to brewers. The sulphuric acid contained arsenic which spoilt the glucose made by the purchasers and the beer made by the brewers, who in consequence sued the purchasers and recovered damages from them. In an action by the purchasers against the vendors it was held that they could recover (i) the price of the acid, (ii) the value of the materials spoilt in making glucose, but not (iii) the damages paid

(c) See s. 11 (1) (c), *ante*, p. 645.

(f) S. 53 (1) (2) (3) (4).

(g) *Ante*, pp. 672, 673.

(h) [1904] 1 K. B. 735; 73 L. J. K. B. 521.

to the brewers (because they had not communicated the purpose for which they required the acid), nor (iv) damages for injury to the goodwill of their business, which did not arise from the act of the defendants, but from their own act in selling the glucose to the brewers.

It may further be noted that, in an action for damages for breach of warranty, being an action for breach of contract, damages could, even before 1934, be claimed in respect of the death of a human being, though this was not possible in an action of tort, except under the Fatal Accidents Act, 1846 (i). Thus, in *Jackson v. Watson & Sons* (j), it was expressly held that a husband whose wife had been poisoned by tinned salmon could claim damages for expenses to which he had been put by the loss of services. Similar damages had been allowed in the earlier case of *Frost v. Aylesbury Dairy Co.* (ante, p. 649), where, however, this point was not raised.

As to interest, see p. 234.

*Actions for detinue and conversion.*—Independently of the foregoing rules, but subject to ss. 25 and 47 of the Act (k), where the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer will have an action of detinue against him or any other person in possession of the goods, and may also have an action for conversion against the seller or a third person (l).

#### SUB-SECTION 6.—*Auction Sales*

By s. 58 of the Sale of Goods Act it is provided that “In the case of a sale by auction—

1. Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale :

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid :

3. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer :

(i) *Ante*, p. 287.

(j) [1909] 2 K. B. 193; 78 L. J. K. B. 587.

(k) *Ante*, pp. 659, 671.

(l) *Ante*, Part 2, Chapter 2.

4. A sale by auction may be notified to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

Where goods are offered by auction subject to a reserve price, each bid is a conditional bid subject to the price offered reaching the reserve price, and the fall of the hammer is an acceptance of that conditional offer. Where, therefore, an auctioneer by mistake knocked down a lot to a purchaser who had not bid the reserve price, and, discovering his mistake, refused to sign a memorandum of the contract, it was held that no action lay against him either for not completing the contract or for breach of warranty of authority (*m*).

By the *Auctions (Bidding Agreements) Act, 1927*, it is provided that if any dealer agrees to give, or gives, or offers any gift or consideration to any other person as an inducement or reward for abstaining, or for having abstained, from bidding at a sale by auction either generally or for any particular lot, or if any person agrees to accept, or accepts, or attempts to obtain from any dealer any such gift or consideration as aforesaid, he shall be guilty of an offence under this Act and liable on summary conviction to fine and imprisonment. But, where it is proved that a dealer has previously to an auction entered into an agreement in writing with one or more persons to purchase goods at the auction *bona fide* on a joint account and has before the goods were purchased at the auction deposited a copy of the agreement with the auctioneer, such an agreement shall not be treated as an agreement made in contravention of the section (*n*).

Any sale at an auction, with respect to which any agreement or transaction in contravention of the Act has been made or effected, and which has been the subject of a prosecution and conviction, may, as against a purchaser who has been a party thereto, be treated by the vendor as a sale induced by fraud. But a notice or intimation by the vendor to the auctioneer that he intends to exercise such power in relation to any sale at the auction shall not affect the obligation of the auctioneer to deliver the goods to the purchaser (*o*).

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(*m*) *McManus v. Fortescue & Branson*, [1907] 2 K. B. 1; 76 L. J. K. B. 398.

(*n*) S. 1 (1). By s. 1 (2) the expression "dealer" means a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them.

(*o*) S. 2.

## SECTION 2.—HIRE—HIRE-PURCHASE—CREDIT SALES

## SUB-SECTION 1.—Hire

The hiring agreement.—A hiring agreement is one under which a person, the letter to hire, usually the owner, of a thing, agrees for a consideration (normally a periodic rental) to allow its use to another person, the hirer, as distinct from an agreement under which it is received from the owner for the purposes of repair or to hand to a third party or merely for safe custody.

The thing hired may be animate (*e.g.*, a horse) or inanimate (*e.g.*, a piano) but, as slavery is no longer permitted, it cannot be a human being, although the term "hiring" remains in use for the engagement of the services of a manual worker (*p*). Nor can the thing hired be money (*i.e.*, current coin as distinct from coins regarded and treated as curios) since the obligation resulting from a financial loan is a debt, the lender being merely entitled to repayment (with interest if so agreed or allowed by law) of an equivalent sum in any form that constitutes legal tender (*q*). Nor, again, can a *chose in action* be hired as, although it may be enjoyed in the sense that it may be sold or mortgaged, it cannot be made physical use of. The subject-matter of hire must, therefore, be in the nature of "goods", *i.e.*, it must be a chattel which can be passed over by delivery, actually used or physically enjoyed by the deliverer, and returned to the owner (not necessarily in the same condition) on the termination of the hiring (*r*).

Inasmuch as a hiring is a contract, it is governed in the first instance by the rules relating to contracts set out earlier in this work (*s*). For example, it may be in writing or oral, although, if the latter, it cannot be enforced by action without written evidence in accordance with the Statute of Frauds in cases where it appears that the parties contemplated its duration for more than a year, even though it may be terminated by one or the other party within a year. So, in a case where the defendant orally hired a carriage for five years on condition that he could determine the contract at any time by payment of a year's hire rental, it was held that the plaintiff could not enforce the

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(*p*) Such a hiring belongs, of course, to the topic of "Master and Servant", *ante*, Part III, Chap. II.

(*q*) In the United States, a loan of money is frequently referred to as a "hiring".

(*r*) For this reason it is difficult to visualise consumable goods as the subject of hire, although the difficulty is, perhaps, less in the case of hire-purchase (dealt with later in this chapter) as in such a contract the ultimate purpose in contemplation is actual purchase by the hirer.

(*s*) Part I.



contract in the absence of a note or memorandum signed by the defendant (t). Again, the rules as to capacity to contract apply: e.g., an infant who enters into a hiring agreement is not liable upon it unless the hiring was for his benefit, i.e., unless the thing hired was a *necessary*, having regard to his actual requirements and station in life. In such circumstances an infant is liable for the hire of a horse (u), a bicycle (x) and a car (y); but, since an infant cannot be liable on a trading contract, he is not liable for the hire of an article used for the purpose of a business carried on by him (z). Again, a hiring agreement may be void for illegality, e.g., where a brougham was hired to a prostitute, the owner knowing that it was to be used by the hirer for the purpose of plying her trade (a), and where an automatic machine, the working of which constituted a game of chance, was let on hire (b). Finally, the rules previously given (c) relating to remedies for breach of contract apply generally to agreements for hire, e.g., if after entering into the agreement the owner does not make delivery of the thing hired, although the hirer cannot as a rule obtain specific performance, he can recover damages for the breach of contract, and, on the other hand, the hirer is liable in damages if he refuses to accept delivery (d).

**Possession.**—Possession of the goods under a hire agreement is usually given by direct delivery from the owner to the hirer, but it is not necessarily so given. The hirer may be already in possession of the goods, e.g., as custodian, or for the repair of them, and in such cases he merely changes the capacity in which he holds them. Or the goods may be in the possession of a third party, e.g., a warehouseman, to be delivered by him to the hirer on the direction of the owner. The owner himself may change his capacity from that of owner to that of hirer, e.g., A, the owner, may sell the goods to B and, without delivering them to B, enter into an agreement under which he hires them from B.

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(t) *Birch v. Earl of Liverpool*, 9 B. & C. 392.

(u) *Hunt v. Porter*, 1 Jur. 623.

(x) *Glyde Cycle Co v. Hargreaves*, 78 L. T. 296.

(y) *Fawcett v. Smethurst*, 31 T. L. R. 85.

(z) *Cowern v. Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865. And see *Mercantile Union Guarantee Corporation v. Bell*, [1937] 2 K. B. 498; 106 L. J. K. B. 621, where an infant haulage contractor was held not liable for the hire of a motor lorry. This was, moreover, a *hire-purchase* contract and it is uncertain whether an infant can be made liable on such under any circumstances.

(a) *Pearce v. Brooks*, 14 L. T. 288.

(b) *Pessers-Moody v. Catt*, 29 T. L. R. 381.

(c) *Ante*, Part I, Chap. 7.

(d) *National Cash Register Co. v. Stanley*, [1921] 3 K. B. 292; 90 L. J. K. B. 1220.

But such a transaction must be genuinely what it pretends to be and not a ruse for evading the Bills of Sale Acts (e). In the example given, if the intention was that A should borrow £100 from B upon the security of A's goods, and a document was executed under which A purported to sell the goods to B for £200 and to hire them from B for, say, a year, at a total rental fee of £250 (so as to include interest), the result would be, if the transaction held good, that A would, in effect, have mortgaged his goods while not parting with possession of them. In the circumstances the document would be held to constitute a bill of sale and to be void as such, firstly because unregistered and secondly because not in the form required for a bill of sale to secure money lent (f).

**Hiring a bailment.**—When the hiring has been fully constituted by delivery of the goods to the hirer, the transaction becomes a *bailment* of the class known as *locatio rei* or *locatio et conductio*, and, apart from any provisions in the hire agreement modifying those implied by law, the rights and duties of the owner and the hirer respectively have already been given (g) and need not be repeated here. It is, however, for the purpose of what follows in this chapter, necessary to emphasise that throughout the hiring the owner remains the legal owner of the goods, while the hirer has merely what is known as “special property” in them, embracing as against the owner the right to the possession and user of the goods and, as against wrongdoers, the rights incident to lawful possession, *viz.*, to recover such possession if deprived of it and to recover damages for wrongful detention or conversion of the goods or for injury to them by negligence (h).

**Hire and credit sale distinguished.**—It is also desirable to point out the distinction between a hiring at a rental and the acquisition of goods upon terms that the acquirer pays for them by instalments. The latter transaction constitutes a sale even

(e) See *post*, pp. 704 *et seq.*

(f) *Madell v. Thomas & Co.*, [1891] 1 Q. B. 280; 60 *L. J. Q. B.* 227.

(g) *Ante*, Chap. IV. Thus the bailor is under the same implied duty to see that the chattel hired is as fit for the purpose as reasonable skill and care can make it. *Reed v. Dean*, [1948] 1 K. B. 188; 64 *T. L. R.* 621. And see *North Central Wagon and Finance Co. v. Graham*, [1950] 1 All E. R. 780, C. A.

(h) But the owner who illegally resumes possession cannot be sued in *tort*, *i.e.*, in detinue or conversion, since the ownership of the goods has remained in him. He can, however, be sued in damages for breach of contract—see *Carr v. Broderick & Co.*, [1942] 2 K. B. 275; 111 *L. J. K. B.* 687.

if it provides that the property in the goods shall, notwithstanding delivery, remain in the original owner until the entire purchase price has been paid; accordingly its legal effects, whether as between the immediate parties or as between either of them and third parties, must be gathered from the study of the topic of Sale of Goods (i). It may, however, be stated that the effective difference for the present purpose between delivery under a hiring and delivery under a sale with a proviso that the property in the goods shall continue in the seller until payment of the purchase price is this—that in the former case a third party will not obtain title to the goods against the owner by purchase from the hirer, notwithstanding that he was unaware that the goods were merely on hire (j), while in the latter case a third party who acquires from the buyer for value and without notice of the rights of the original seller will obtain a good title by virtue of the Factors Act, 1889, or of s. 25 (2) of the Sale of Goods Act, 1898 (k). It was in order to conserve the advantageous position of the owner against both the other party and third parties while offering to the other party the allurements of purchase on credit terms that in recent times was devised the hire-purchase contract now to be dealt with.

### SUB-SECTION 2.—*Hire-Purchase*

**Types of hire-purchase agreements.**—In a hire-purchase agreement the goods are let to the hirer at a periodic rental with the proviso that when, and only when, the rental payments have aggregated a certain sum the property in the goods shall pass absolutely to the hirer. The agreement is, therefore, simply a hiring (l) with an option of purchase by the hirer, the option being exercisable by continuance of the hiring until the payments under it have reached an agreed sum equal to the purchase price of the goods hired. Until the option has been exercised, i.e., until the agreed sum has been reached, the contract remains

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(i) *Ante*, Chapter V, Section 1. Certain classes of sale by deferred payments have, however, been the subject of legislation in the same statute as that which deals with similar classes of hire-purchase, and are, therefore, conveniently, if not logically, dealt with at the end of the present section under the caption of "Credit Sales".

(j) The position of the owner is, nevertheless, not secure as the owner may lose his right to the goods in the event of the hirer's bankruptcy by reason of the "reputed ownership" provisions of the Bankruptcy Act, 1914, s. 38, or of the Law of Distress Amendment Act, 1908, s. 4. These provisions are dealt with later in this chapter.

(k) *Ante*, p. 660.

(l) And, therefore, what has been stated with reference to hiring agreements in general applies equally to hire-purchase agreements.

one of hire both in relation to the prospective buyer and in relation to third parties. If at any stage the option to purchase goes, the whole value of the agreement to the hirer goes with it. Therefore, in a case where a hirer, with an option to purchase, made the final payments, but the car, the subject of the agreement, was then found to belong to a third party and had to be returned, it was held that the hirer was entitled to damages for breach of warranty of title and that the defendants could not claim by way of set-off or counterclaim, money for the hire of the car for the months during which the plaintiff had had the use of it (*m*). But the option must be real and not illusory, that is to say, the hirer must not in effect be *compelled* to exercise the option, for in such case the transaction ceases to be one of hire.

Thus in *Lee v. Butler* (*n*) the agreement provided that upon the hire-rental payments reaching a certain amount the goods should become the property of the hirer, but the agreement also *bound* the hirer to pay hire-rental to that amount. The Court held that the agreement did not give the so-called "hirer" an *option* of purchase but amounted to a sale agreement with him, and therefore a purchaser in good faith from him was entitled to the goods as against the owner by reason of the Factors Act, 1889. The fact that the agreement in question contained a provision that until payment of the sum in question the goods were to remain the property of the owner did not affect the matter, since it was against such a provision that the Factors Act was designed to protect *bona fide* purchasers. On the other hand, in *Helby v. Matthews* (*o*), although the hirer under the agreement contracted to continue paying the instalments until they reached a certain sum which would cover the greater part of the purchase price, there was an overriding proviso that he could terminate the hiring at any time by returning the goods to the owner and so absolve himself from any further payment. The Court held that the hirer had not undertaken to buy the goods, that the agreement was purely one of hire with an option of purchase superadded, and that accordingly the hirer could not give a good title to a third party even though such party had bought without notice of the rights of the owner.

*Helby v. Matthews* settled for the time being the type of hire-purchase agreement in general use, but it must not be thought that the type appearing in *Lee v. Butler* has become

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(*m*) *Warman v. Southern Counties Car Finance Corporation*, [1949] 1 All E. R. 711.

(*n*) [1898] 2 Q. B. 818.

(*o*) [1895] A. C. 471.

obsolete. Under the latter, although the letter to hire will lose his right of ownership against a *bona fide* purchaser for value from the hirer, he retains it meanwhile against the hirer himself and, in addition, he possesses the advantage of being able to sue the hirer for the full price of the goods. In many cases, *e.g.*, motor cars, where the goods once in use will quickly lose their market value, the letter to hire rates such advantage higher than a right to recover the goods from third parties and will take the risk of disposal by the hirer. In other words, he prefers a claim for his full money to the return to him of depreciated goods.

But apart from the types of agreement considered in the two decisions mentioned, there is now in use a third type based on the requirements of the Hire-Purchase Act, 1988, a statute which governs the bulk of hire-purchase transactions at the present day (p).

**Effect of distress and bankruptcy.**—Before passing to a consideration of the statute of 1988, it is desirable to deal with a topic in connection with all hire-purchase transactions (*whether or not within the legislation of 1988*), which has been the subject of much litigation, *viz.*, the position of the owner in relation to the hirer's landlord and to the hirer's trustee in bankruptcy.

By the Law of Distress Amendment Act, 1908, goods not in the ownership of the tenant can be taken out of a distress for rent (subject to the owner complying with certain formalities prescribed by the statute), but s. 4 of the statute makes this rule subject to certain exceptions, of which two concern the owner under a hire-purchase agreement. These are (i) goods comprised in any hire-purchase agreement made by the tenant and (ii) goods in the possession, order, or disposition of the tenant by consent and permission of the owner under such circumstances that the tenant is the reputed owner thereof.

As regards (i) two points are to be observed. First, the goods must be *comprised in the agreement*, and if the agreement no longer exists the landlord cannot distrain upon them. If, therefore, the agreement contains a provision that in a certain event the owner may determine the agreement and, the event having occurred, the owner gives notice of determination before the distress, the goods are no longer comprised in the agreement, since

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(p) In *Scammell and Nephew v. Ouston*, [1941] A. C. 251; 110 L. J. K. B. 197, it was held that in view of the varying forms of hire-purchase transactions, an agreement for purchase "on hire-purchase terms" was unenforceable for uncertainty.

the agreement no longer exists (q). And the same rule apparently applies if the agreement provides for its *automatic* determination upon certain events (r). Notwithstanding the determination the owner remains entitled to recover his goods from the hirer, but not by virtue of the agreement, and his claim is in *detinue* (s). It is to be observed that it is the *agreement* which must be put an end to and not merely the *hiring*, for in such case the agreement still exists and the owner's claim to his goods is by virtue of the agreement (t). The fact that the hirer remains liable for any breach of the agreement committed before its determination does not affect the matter as the question always is not whether the owner retains any money claim under the agreement but whether he retains any claim to the goods by virtue of it (u). The other point to be observed in regard to (i) is that the hire-agreement must have been made by the *tenant* and, therefore, if, for example, it was made with the wife of the tenant, the owner can take the goods out of the *distrain* (x). This applies, notwithstanding the provision in the statute that goods belonging to the husband or wife of the tenant are not to be subject to exemption, since the goods did not belong to the wife but to the letter to hire under the agreement (y). It is to be observed that even if the goods do not fall within exception (i) they may still fall within exception (ii) now to be dealt with.

(ii) Under a hire-purchase agreement the goods are in the possession, etc., of the hirer and, in spite of the well-known extent of the practice of purchase on the hire-purchase system, a person is the reputed owner of all goods in his possession and it is assumed by the law that they are not on hire and that he is not in the process of acquiring them by hire-purchase (z). He is also, under his agreement, in possession with the consent of the owner. The only way, therefore, by which the owner can save his goods from *distrain* is by putting an end to the agreement (*not merely the hiring*), and what has been stated above as to the conditions and method of his so doing apply in this case, that is to say, he must, before the *distrain*, not merely put an

(q) *Smart Brothers v. Holt*, [1929] 2 K. B. 303; 98 L. J. K. B. 532.

(r) *Times Furnishing Co. v. Hutchings*, [1938] 1 K. B. 775; 107 L. J. K. B. 482.

(s) *Per Wright, J.*, in *Smart Brothers v. Holt*, *supra*.

(t) *Hackney Furnishing Co. v. Watts*, [1912] 3 K. B. 225; 81 L. J. K. B. 993; *Jay's Furnishing Co. v. Brand*, [1915] 1 K. B. 458; 84 L. J. K. B. 867.

(u) *Per Phillimore, L.J.*, in *Jay's Furnishing Co. v. Brand*, *supra*.

(x) *Shenstone v. Freeman*, [1910] 2 K. B. 84; 79 L. J. K. B. 982; *Rogers v. Martin*, [1911] 1 K. B. 19; 80 L. J. K. B. 208.

(y) *Shenstone v. Freeman*, *supra*.

(z) *Re Fowler, ex p. Brooks*, 23 Ch. D. 261.

end to the hiring but to the agreement itself, or at any rate he must not retain any right to recover his goods by virtue of the agreement. And the warning is necessary that, having put an end to the agreement and become entitled to recover his goods in *detinue*, he should act promptly to that end. If he merely puts an end to the agreement and there lets the matter rest, he runs the risk, after a lapse of time, of having consented to the goods being in the possession of the owner and so bringing himself after all within the "reputed ownership" exception of the statute. His only safe course appears to be to demand his goods at once, and on non-compliance to institute proceedings for their recovery.

The Bankruptcy Act, 1914, s. 88, included among the property to which the trustee in bankruptcy is entitled goods in the reputed ownership of the debtor and the relative provision is worded similarly to the corresponding provision of the Distress for Rent Amendment Act, 1908, with the exception that the goods must have been in the possession, order or disposition of the debtor "in his trade or business". The trustee's position therefore is weaker than that of the owner under a hire-purchase agreement, since he has no rights merely because the goods are comprised in such an agreement, and in addition he must show that the hirer had the goods in his trade or business. Furthermore, whereas goods other than those used in trade or business are in the reputed ownership of the hirer, proof of a custom of trade to supply on the hire-purchase system goods of the class comprised in the agreement will defeat the claim of the trustee. Instances are hire-purchase of furniture by boarding-house keepers, of machinery in certain trades, and a number of others.

#### SUB-SECTION 3.—*The Hire-Purchase Act, 1938*

The revival of normal trading conditions after the close of the war of 1914-18 witnessed a phenomenal expansion of hire-purchase among all ranks of the people. A consequence was the growth of a certain amount of unscrupulous dealing, particularly in the furniture trade, not perhaps surprisingly large in relation to the totality of business but nevertheless sufficient to constitute at least a minor "racket", which moreover found its victims mainly among the poorer classes of the community. The result was the Hire-Purchase Act, 1938 (hereinafter referred to as "the Act"), which was designed to make the prospective hirer aware of the nature of the contract into which he was about to enter, to mould the contract itself into a form which gave him a fair deal, and finally so to regulate the enforcement of the contract

as to prevent its bearing with undue harshness upon a hirer who found himself unable to carry out its terms.

**What agreements are within the Act.**—In order to prevent evasion the Act is made to extend to transactions which go beyond hire-purchase proper, that is to say, hire with option of purchase. S. 21 defines hire-purchase as “an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee”. The Act, therefore, cannot be by-passed by delivering the goods under some form of bailment other than hire, say, for safe custody (a), and giving the bailee an option of purchase, e.g., that the bailee should if he so desire be able to make himself the owner by payment of a certain sum by instalments. Such a transaction, whether genuine or colourable, would constitute hire-purchase within the meaning of the Act (b). A further method of evasion is met by the above definition of “hire-purchase” going on to provide that “where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods, and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made”. Thus, in the example above given, a hire-purchase agreement would be constituted within the meaning of the Act although a distance of time separated the delivery for safe custody and the option of purchase, and the hire-purchase agreement would be deemed to have been made at the time of the granting of the option.

Since the Act was primarily intended for the protection of the lower income groups, its operation is confined to transactions within certain financial limits. By s. 1, the Act is made to apply to all hire-purchase agreements under which the hire-purchase price does not exceed £100, except that in the case of motor

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(a) *Locatio operis faciendi*.

(b) It is an open question whether an agreement in the *Lee v. Butler* form (*ante*, p. 681) would, if within the financial limits of the Act, fall within the Act by virtue of the above definition. As has been pointed out, such an agreement has been held to constitute a sale and not one for hire-purchase, but it would nevertheless come within the Act if it created a bailment, a matter which itself depends upon what precisely constitutes the ambit of bailment. The problem cannot be discussed further in this place, and it is unlikely to be solved without judicial assistance. It is, however, not perhaps at the moment of great practical importance since, although as indicated (*ante*, p. 681) the *Lee v. Butler* type of agreement is still in extensive use, such use is confined to transactions of a size which takes them out of the Act.



vehicles (c), railway wagons and other railway rolling stock, the limit is reduced to £50, while in the case of livestock (d) it is raised to £500.

The expression "hire-purchase price" means "the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement". A transaction cannot be taken out of the Act by a pretence which makes the "hire-purchase price" appear greater than it is in fact; so where a hire-purchase agreement provided that the hirer should become the owner of a motor vehicle upon the hire-rental amounting to £62, the first payment of rental to be £25 and thereafter £8 1s. 8d. a month, and it appeared that the £25 was not in fact paid and was not intended to be paid, it was held that the "hire-purchase price" was £87, not £62, and that the agreement came within the Act (e).

**Essentials of the agreement.**—S. 2 of the Act specifies five requirements relating to the agreement.

(i) *Before the agreement is entered into the owner must state in writing to the prospective hirer, otherwise than in the agreement itself, the "cash price" of the goods, i.e., the price at which the prospective hirer may, if he so choose, buy the goods for ready money.* It is provided, however, that this requirement will have been sufficiently complied with, firstly, if the prospective hirer inspected the goods, or similar goods, and tickets or labels were attached to or displayed therewith clearly stating the cash price, which may be of the goods as a whole or of the various articles or sets of articles comprised in the goods; or, secondly, if the hirer selected the goods by reference to a catalogue, price list or advertisement which clearly indicated such cash price.

(ii) There must be a note or memorandum of the agreement which must be signed by both hirer and owner. The hirer must sign in person, but the signature of the owner or any other party to the agreement (e.g., a surety for the hirer) may be by agent.

(iii) The note or memorandum must list the goods comprised in the agreement, set out the cash price and hire-purchase price

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(c) By s. 21: "Motor vehicle" has the same meaning as in the Road Traffic Act, 1930.

(d) By s. 21: "Livestock" means horses, cattle, sheep, goats, pigs and poultry.

(e) *Menzies v. United Motor Finance Corporation*, [1940] 1 K. B. 559; 109 L. J. K. B. 145.

respectively, and state the amount and date when each instalment is payable or its mode of determination, *e.g.*, "on the first Monday in each calendar month".

(iv) The note or memorandum must contain a notice, at least as prominent as the rest of the wording, in the form set out in the Schedule to the Act. The notice in question relates, in part, to the rights and obligations of the hirer if he exercises his right to determine the agreement, and, in part, to the restriction of the owner's right to recover the goods when such right arises under the agreement. Both these parts will be further referred to in connection with the main provisions of the Act to which they relate.

(v) Finally, a copy of the note or memorandum must be delivered to the hirer within seven days of the making of the agreement.

S. 2 of the Act imposes drastic penalties for non-compliance with any of the foregoing requirements. Not only is the agreement made unenforceable against the hirer or any guarantor for the hirer, but the owner cannot even recover back his goods or enforce any security for performance of the agreement given by the hirer or any third party. Where just and equitable, however, and the hirer would not be prejudiced, the Court may, on the owner seeking to enforce the agreement and subject to any conditions the Court may think fit to impose, dispense with any of the requirements except (ii), *i.e.*, the duly signed note or memorandum, as to which there can be no dispensation (f).

**Ineffective provisions.**—The Act not only lays down certain positive requisites of the agreement but shapes it further by rendering inoperative certain provisions which otherwise the owner might be tempted to include, although these may still be inserted with effect in hire-purchase agreements which do not fall within the Act.

By s. 5 the following provisions are declared void :—

(i) What is known as the "licence to seize", *i.e.*, the conferment upon the owner or his agent of a right of entry upon premises for the purpose of taking possession of the goods, or relief from liability for such entry. This avoids not

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(f) It is usual to insert in the agreement a clause in which the hirer agrees that requirement (i), *i.e.*, preliminary statement of the "cost price", has been complied with in one or other of the prescribed ways. The value of the clause problematic. It certainly does not estop the hirer from proving the contrary. At the most it would appear to constitute an admission to be used in cross-examination in the hope of discrediting a hirer who alleges that the Act has not been complied with.

only any right given to make *forcible* entry (g), but even to make unopposed entry as distinct from entry by express consent given *ad hoc* at the time of entry.

(ii) The exclusion or restriction of the right of the *hirer* conferred by s. 4 (h) to determine the agreement, or the "clogging" of the exercise of such right by the imposition of any liability in excess of that imposed by the Act itself.

(iii) The subjection of the *hirer* to any liability after determination of the agreement in any manner whatsoever (for example, by the owner as distinct from the *hirer* under the owner's right to determine) in excess of the *hirer's* liability fixed by the Act itself, i.e., by ss. 4 and 19 (i).

(iv) The relief of the owner from liability for the acts or defaults of his agent in connection with the formation or conclusion of the agreement either expressly or by the device of constituting the agent of the owner the agent of the *hirer* as well.

Again, by s. 8 (8) (k), certain implied warranties and conditions in relation to the goods cannot be excluded by the agreement.

Finally, by s. 9 (l) certain rules laid down in that section as to appropriation of payments where a *hirer* has entered into two or more agreements cannot be contracted out of.

**Implied terms.**—By s. 8 certain conditions and warranties are implied in the agreement which bear a general resemblance to those implied upon an ordinary sale of goods under the Sale of Goods Act, 1898 (m), but with some important variations or limitations. They are (i) warranty of quiet possession, (ii) condition of right to sell, (iii) warranty of freedom from encumbrances, (iv) condition of merchantable quality and (v) condition of fitness for a particular purpose.

(i) The warranty for quiet possession refers only to *lawful* interference, e.g., where the goods did not belong to the letter to hire and the true owner recovers from the *hirer's* possession or damages for conversion. It is obvious that the warranty cannot

(g) Already forbidden by 5 Rich. 2 (Statute of Forcible Entry), see *ante*, p. 318.

(h) See *post*, p. 691.

(i) *Ibid.*

(k) *Infra.*

(l) See *post*, p. 690.

(m) See *ante*, pp. 686 *et seq.*

reasonably be made to extend to *unlawful* interference for which the letter to hire is not responsible (n).

(ii) The condition of right to sell means that the letter to hire shall have such right at the time when the property in the goods is to pass to the hirer, i.e., when the hirer exercises his option to purchase. It does not mean that the letter to hire must have such right at the time he enters into the agreement. Between the date of the agreement and the date of the actual purchase of the goods the letter to hire merely warrants quiet possession. The Act (o) defines "owner" as the person who "lets" the goods, not as the person possessing the actual ownership. It is therefore sufficient if the letter to hire acquires ownership by the time the property in the goods is to pass to the hirer.

(iii) In respect of the warranty of freedom from any charge or encumbrance there is a difference between the provisions of the Act and the corresponding provisions of the Sale of Goods Act, 1898. In the latter enactment, the warranty does not apply if the buyer had notice of the charge or encumbrance at the time of purchase, but the warranty in the present Act appears to be absolute and unaffected by the knowledge of the hirer.

(iv) The condition that the goods are of merchantable quality is made subject to three exceptions: first, where the goods are second-hand (p) and the agreement so states; secondly, where the lack of merchantable quality is due to defects of which the owner could not reasonably have been aware at the time of making the agreement; and, thirdly, where the hirer had examined the goods or a sample and such examination ought to have revealed the defects.

(v) As in the Sale of Goods Act, 1898, the condition that the goods shall be reasonably fit for some particular purpose applies where the hirer has, expressly or impliedly, made such purpose known to the owner, but apparently the hirer has not, as under the Sale of Goods Act, 1898, to show that he relied on the owner's skill and judgment, nor that the goods were of a description which it was in the course of the owner's business to supply, nor, as under the Sale of Goods Act, 1898, is the owner relieved from the condition in the case of a specified article supplied by him under its patent or other trade name.

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(n) See *Dudley v. Follott*, 3 T. R. 584.

(o) S. 21.

(p) The Act does not define "second-hand". According to the Oxford Dictionary it means "bought after use by a previous owner," and to have no reference to the actual condition of the goods, which may be "as good as new" but, nevertheless, second-hand.

As regards (i) to (iv) of the above, there is this vital difference between an ordinary agreement for sale and a hire-purchase agreement within the Act, that in the latter transaction, as previously stated, the agreement cannot exclude the conditions and warranties referred to (q), while as regards (v) the condition can only be modified or excluded if, *before the agreement was made*, the provision as to modification or exclusion was brought to the hirer's notice and its effect made clear to him.

**Appropriation of payments.**—The ordinary rule as to appropriation of payments where the debtor owes two or more debts to the same creditor is that in making a payment the debtor may appropriate it to any of the debts and that, if he does not do so, the creditor may appropriate, while if appropriation is not made by either debtor or creditor the rule (put very roughly) is that the payment will be deemed appropriated to the debt of longest standing (r). In hire-purchase agreements within the Act, a very different rule prevails where a person is a hirer under two or more agreements with the same owner. By s. 9, in accordance with the ordinary rule, the hirer has the first right of appropriation of the payment towards any one of the agreements or between them in such proportions as he shall think fit, but if he does not appropriate the owner has no power to do so, and the payment is to be appropriated between the several agreements in proportion to the respective sums due under them. Moreover, as already indicated, the section provides that the rules laid down in it are to apply “notwithstanding any agreement to the contrary”.

**Exchange of information.**—To enable the hirer at any time to ascertain his position under the agreement, it is provided by s. 8 that at any time before the final payment he shall (on written request and payment of 1s. for expenses) be entitled to a copy of the agreement together with a signed statement showing how he stands in relation to the payments thereunder. Such statement must indicate: (i) how much he has paid already; (ii) how much he is in arrear, with the amount and date of each instalment of the arrears; and (iii) the sum remaining payable under the agreement (apart from the arrears) with the amount and date, or mode

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(q) For an example of the exclusion of the conditions and warranties to be implied under the Sale of Goods Act, 1893, in a hire-purchase agreement outside the 1938 Act, see *Webster v. Higgin*, [1948] 2 All E. R. 127, C. A.

(r) See *ante*, p. 217.

of determining the date, of each instalment of such sum. The foregoing must be supplied within four days, and upon default and until compliance, unless reasonable cause can be shown for non-compliance, the agreement cannot be enforced against the hirer or any guarantor for the hirer, the owner cannot enforce any right to recover the goods from the hirer, nor can any security given by the hirer or by any guarantor for the hirer be enforced. Furthermore, if the default continues for a month without reasonable cause, the defaulter becomes liable on summary conviction to be fined ten pounds.

The duty of giving one particular item of information is imposed upon the hirer. By s. 7, if the agreement imposes upon the hirer a duty to keep the goods in his own possession or control, the hirer must, on the written request of the owner, inform the owner where the goods are at the time he gives the information or, if he sends the information by post, at the time of posting it. The hirer must give the information within fifteen days after receipt of the request and he becomes liable on summary conviction to a fine of ten pounds if he makes default without reasonable cause (s).

**Hirer's right to determine.**—As indicated earlier in this chapter, it is of the essence of the hire-purchase agreement that the hirer shall be entitled to determine the agreement at any time, but whereas, in agreements which do not fall within the Act, the owner may encumber the right of determination to any extent short of converting the transaction into a sale, in agreements within the Act the owner may not in this respect go beyond the conditions permitted by the Act itself. By s. 4, the hirer may at any time before the final payment becomes due determine the agreement by notice in writing to any person entitled or authorised to receive the payments under the agreement, that is to say, he may give such notice either to the hirer or the hirer's agent in that behalf or to any person whom the owner has placed in charge of the collection of the instalments of hire-rental. The determination will not affect any liability of the hirer which had accrued before the determination, but he will incur no further liability under the agreement itself and in substitution therefor he will be under the following liabilities:—

(i) To pay the owner such further sum as, with the instalments already payable because in arrear (if any), will bring his

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(s) In one part of the section, the owner's demand is called a "request", in another part is called a "notice". Presumably no difference of meaning is implied.

total payments up to one-half of the hire-purchase price (t). The extra payment is intended to compensate the owner for depreciation of the goods;

(ii) If he has failed to take reasonable care of the goods, to pay the owner damages for such failure;

(iii) To permit the owner to retake possession of the goods. He need not deliver the goods to the owner and any provision in the agreement that he should do so would be void under s. 5 (u) as a liability by reason of determination additional to that imposed by the Act. Moreover, if he wrongfully retains possession, the Court may ("unless it is satisfied that having regard to the circumstances it would not be just and equitable so to do") order specific delivery of the goods to the owner without giving the hirer the option to pay their value instead.

A restatement, in simple language, of the hirer's right to determine and of his liabilities in so doing (except (iii) above) constitutes the first part of the notice which must be included in the note or memorandum of the agreement (w), and the notice must indicate the precise sum payable by the hirer on determining the agreement, arrived at in accordance with above method of computation. The notice also contains a reminder that if the terms upon which the hirer may determine the agreement contained in the agreement itself are more favourable to him than those imposed upon him by the Act, he may take advantage of the more favourable terms.

**Owner's right to determine.**—The Act places no limitation upon the owner's right to put an end to the agreement, which may contain provision for determination by the owner in any event, or upon any ground, therein specified. What the Act does (by s. 11) is regulate the owner's right, not to determine the agreement, but to recover possession of the goods upon such determination in one particular case. Such case is where one-

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(t) By s. 19, when the hire-purchase price includes "installation charges" (as defined in the section) and the amount is specified in the agreement, the owner is entitled to include the installation charges in full in computing the "one-half" of the hire-purchase price, by first subtracting the amount of the charges from the hire-purchase price, taking one-half of the balance and writing back the amount of the charges to such half. The result is a "one-half" which in fact exceeds one-half. Thus—full hire-purchase price is £50, of which £5 is the installation charge specified, leaving £45 as the price of the actual goods. One-half of £45 is £22 10s., to which add the £5 installation charge, making £27 10s. (instead of £25) as the statutory one-half.

(u) *Ante*, p. 687.

(w) *Ante*, p. 687.

third of the hire-purchase price (*x*) has been paid ("whether in pursuance of a judgment or otherwise, or tendered by or on behalf of the hirer or any guarantor"). After such payment the owner must not *enforce* (*y*) any right to recover possession of the goods from the hirer *otherwise than by action*. The owner is penalised severely if he contravenes this provision of the Act, for (although the owner may retain the goods thus illegally taken) the agreement (if not previously determined) becomes determined thereby and the hirer and any guarantor may recover from the owner any sums already paid by them under the agreement or any security given for performance of the agreement.

When the owner, after lawfully putting an end to the agreement (whether before or after the one-third has been paid), brings an action to recover the goods, he may (by s. 10) prove the necessary "adverse possession" on the part of the hirer by a request in writing for the surrender of the goods, and such request is not invalidated by the inclusion of an option to the hirer to avoid the necessity for the surrender by the fulfilment of certain conditions (*z*).

The action which the owner must bring in order to recover the goods after one-third of the hire-purchase price has been paid must (by s. 12) be brought in the county court for the district where the hirer resides or carries on business or where he resided or carried on business when he last paid an instalment. After action commenced the owner must not take any steps to enforce any payment from the hirer or any guarantor except by claim in the action itself. The guarantor (if any) must be made party to the action. The Court is given the following powers in addition to any powers it has apart from the Act:—

- (i) Pending the hearing, to make orders for protecting the goods against damage or depreciation (including orders restricting or prohibiting user) or directing as to their custody.
- (ii) On the hearing, to order specific delivery of the goods to

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(*x*) When the hire-purchase price includes specified installation charges, by s. 19 the "one-third" is arrived at in a similar manner to the "one-half" under s. 4 (*ante*, p. 692), that is to say, by first subtracting the amount of the installation charges from the hire-purchase price, taking a third of the balance, and then adding to it the amount of reinstallation charges. Thus—hire-purchase price=£50, installation charges=£5. The statutory "one-third" is a third of £45, i.e., £15 plus £5 = £20.

(*y*) Of course, the owner does not "enforce" if the hirer consents to his retaking possession.

(*z*) *Smart Brothers v. Pratt*, [1940] 2 K. B. 498; 109 L. J. K. B. 952, where it was also held that, after the formal request in writing, it is not necessary for the owner to attend the hirer's premises and make a further demand for the surrender.



the owner without giving the hirer the option of paying their value; or to order specific delivery to the owner with postponement of the operation of the order on condition that the hirer or guarantor pays the balance of the hire-purchase price in such manner as the Court may order and subject to any other conditions the Court may think just (a); or to order specific delivery to the owner of part of the goods and transfer of the remainder to the hirer. The Court, however, may not order transfer of part of the goods to the hirer unless "the amount which the hirer has paid in respect of the hire-purchase price exceeds the price of that part of the goods (b) by at least one-third of the unpaid balance of the hire-purchase price" (c). Where the owner has already legally recovered possession of part of the goods, the foregoing will apply, with appropriate changes, to his action for recovery of the remainder, but if he recovers such possession without consent of the hirer after one-third of the hire-purchase price had been paid (d), he loses his right to the aid of the Court to recover the remainder and he cannot recover it without the consent of the hirer.

Sometimes, after the one-third has been paid under an agreement, the owner supplies further goods and a new agreement (sometimes called a "linked-on agreement") is entered into, comprising both the goods comprised in the original agreement and the additional goods, with the result that the one-third paid under the old agreement may not be one-third under the new agreement. Nevertheless (by s. 15) the above restrictions on the owner's right to recover possession will apply to the new agreement, that is to say, once a third paid, always a third paid.

The gist of the foregoing rules as to the owner's right to recover possession is contained in the second part of the notice to be included in the note or memorandum of the agreement, and such part must indicate the precise amount of the "one-third" of the hire-purchase price, so that the hirer can ascertain whether the amount he has paid suffices to compel the owner to go to Court in order to recover the goods without the hirer's consent. This statement of amount is, of course, unnecessary in the case

(a) But the section provides that no order of this kind may be made unless the goods are at the time in possession or control of the hirer.

(b) *I.e.*, the price assigned in the agreement to that part of the goods, or if such goods were not priced separately, then such proportion of the hire-purchase price as the Court determines.

(c) *E.g.*, if the hire-purchase price is £50 and the hirer has paid off £40, leaving an unpaid balance of £10, the Court can transfer to the hirer goods amounting to £36 13s. 4d., because £40 exceeds £36 13s. 4d. by one-third of £10.

(d) *I.e.*, if he has acted in contravention of s. 11.

of a "linked-on" agreement under which (e) the one-third is deemed to have been paid if it was paid under the earlier agreement.

When the Court has made an order for specific delivery of the goods to the owner and has postponed the operation of the order, s. 18 provides that the hirer shall be deemed bailee of the goods under the terms of the agreement except that no further sum shall become payable under the agreement by hirer or guarantor except in accordance with the terms of the order and that the Court may vary the terms of the agreement and of any guarantee to fit in the variation made by the Court in the terms of payment. Furthermore, if during such postponement the hirer or guarantor fails to comply with the conditions of postponement or commits any breach of the agreement, the owner shall not take any civil proceedings in respect of such failure or breach except by way of application to the Court which made the order for postponement. Finally, during the postponement the Court may vary the conditions of postponement and make any further modification of the agreement, and of any contract of guarantee, it considers necessary, or it may revoke the postponement, or do what it might have done in the first instance, *viz.*, order specific delivery of part of the goods to the owner and transfer of the remainder to the hirer.

In cases where the owner claims for money due under the agreement as well as for possession, and the Court makes an order for specific delivery of part of the goods to the owner and transfer of the remainder to the hirer, the Court (by s. 14) must disallow the money claim. And if the Court has postponed the operation of an order for the specific delivery of the goods to the owner, the Court can only entertain the money claim by revoking the postponement and treating the agreement as then and there determined.

**Rights of landlord and of trustee in bankruptcy.**—A statement of the rights of landlord and trustee in bankruptcy respectively in relation to goods comprised in a hire-purchase agreement has been given earlier in this chapter (f), and, as there stated, such statement is applicable to all hire-purchase agreements, including those which come within the Act. The Act, however, contains some specific provisions for the protection of the owner which appear to have been inserted *ex abundanti cautela*, as they do not seem to

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(e) By virtue of s. 15, *supra*.

(f) *Ante*, pp. 682 *et seq.*

go beyond the protection to which he would be entitled independently of such provisions. By s. 16, where the Court has postponed the operation of an order for the specific delivery of goods, the goods are not during such postponement to be treated as within the possession, etc., of the hirer with the consent of the owner within s. 4 of the Law of Distress Amendment Act, 1908, or s. 88 of the Bankruptcy Act, 1914. Furthermore, (i) after the determination of a hire-purchase agreement the goods are not to be treated as comprised in the agreement for the purposes of s. 4 of the Law of Distress Amendment Act, 1908, and (ii) after the owner has the right to recover the goods, and has commenced an action to enforce such right, the goods are not to be treated as within the last mentioned statute, notwithstanding that the Court postponed the operation of an order for specific delivery. As regards (i) the warning (g) may here be repeated that the owner must act promptly to get possession of his goods (by action if necessary) lest by leaving the goods for an undue period in the hands of the hirer he brings himself within the menace of the "reputed ownership" provisions of either of the above mentioned enactments.

#### SUB-SECTION 4.—*Credit Sales*

The provisions of the Hire-Purchase Act, 1908, relating to credit sales can be stated very briefly.

(i) The Act only applies to credit sale agreements within the same financial limits as hire-purchase agreements (h), and, furthermore, only to those where the purchase price is payable by at least five instalments (i). "Total purchase price" means the total sum payable by the buyer, "exclusive of any sum payable as penalty or as compensation or damages for breach of the agreement" (k).

(ii) The requirements stated in this chapter under "Essentials of the agreement" (l) apply (m) to credit-sales, except that the

(g) Given on pp. 683, 684.

(h) S. 1, *ante*, p. 685.

(i) On p. 685, note (b), the question was raised whether an agreement in the *Lee v. Butler* form was a hire-purchase agreement within the Act, provided, of course, that it came within the Act's financial limits. There seems no doubt that, if such an agreement does not fall within the Act as being a hire-purchase agreement, it will fall within it as a credit-sale if the purchase price is spread over five or more instalments.

(k) S. 21. This definition is similar to that of "hire-purchase price" in the case of hire-purchase agreements—see *ante*, p. 686.

(l) *Ante*, pp. 686, 687.

(m) S. 3.

expression "total purchase price" is substituted for "hire-purchase price" and the requirement as to the notice (n) to be contained in the note or memorandum is omitted.

(iii) The provisions of the Act rendering certain provisions void if inserted in the agreement given in this chapter under "Ineffective provisions" (o) are not applied to credit-sale agreements, except that a person acting on behalf of the seller cannot be treated as an agent of the buyer, and that the seller cannot be absolved from the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of the agreement.

(iv) The provisions of the Act given in this chapter under "Exchange of information" (p) apply both to hire-purchase and credit-sale.

Save as above indicated, the provisions of the Act are not made to apply to credit-sales and, indeed, are in their nature only appropriate to hire-purchase. In the case of the implied warranties and conditions given in this chapter under "Implied terms" (q) the buyer in a credit-payment transaction is left to rely upon those imposed on the seller by the Sale of Goods Act, 1898 (r), which are ample in their scope, but which may be contracted out of to any extent, and in the matter of "Appropriation of payments" (s) the Common Law rules apply to credit payments but may be contracted out of.

### SECTION 8.—*Lien, Pledges, and Mortgages of Goods*

#### SUB-SECTION 1.—*Lien*

A Common Law *possessory lien* is the right in one man to retain in his possession goods belonging to another until certain demands of his against the owner have been satisfied (t). It depends entirely upon possession and lasts only while the creditor has continuous possession (u), and must therefore be distinguished from an equitable lien (x), which is a right given to

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(n) *Ante*, p. 687.

(o) *Ante*, pp. 687, 688.

(p) *Ante*, pp. 690, 691.

(q) *Ante*, p. 688.

(r) *Ante*, p. 643.

(s) *Ante*, p. 690.

(t) *Hammonds v. Barclay*, 2 East, at p. 435. Auctioneers and factors have also a lien on the proceeds of goods sold by them: *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J. Q. B. 250.

(u) *Sweet v. Pym*, 1 East 4; 5 R. R. 497; *Forth v. Simpson*, 18 Ad. & El. 680; 18 L. J. Q. B. 268.

(x) *Wilshere's Equity*, Chapter IV, s. 2.

creditors to have certain specific property applied in satisfaction of their demands, and which does not depend upon possession.

The right of lien is one which is given by law (y) in two classes of cases:—

- i. To persons who are under a Common Law duty to render services, as, *e.g.*, common carriers and innkeepers (z).
- ii. To persons rendering services, spending money, skill, or labour, on the property of another person employing them for that purpose, as, *e.g.*, all agents (a) and artificers (b).

The right may be excluded by express agreement or the course of dealing between the parties (c). Thus, it does not exist if the goods are received under a special agreement (d) or for a special purpose (e) inconsistent with its existence. Conversely, it may by agreement be enlarged from a particular lien to a general lien (f).

A *particular* lien is the right to retain goods until demands in respect of those particular goods have been satisfied; a *general* lien is the right to retain goods against a general balance due from the debtor. A general lien can exist only by law, as in the case of innkeepers (g), or by express agreement, or by a custom so well established as to amount to an implied term of the contract (h). Such a custom exists in the case of factors (i), wharfingers (k), packers (l), stockbrokers and bankers (m), solicitors (n) and insurance brokers (o).

(y) *Re Leith's Estate*, *Chambers v. Davidson*, 11. R. 1 P. C., at p. 305; 36 L. J. P. C. 17.

(z) *Ante*, pp. 594–597.

(a) *Ante*, p. 467.

(b) See *Scarfe v. Morgan*, 4 M. & W. 270.

(c) *Re Leith's Estate* (*ubi supra*); *Fisher v. Smith*, 4 App. Cas. 1; 48 L. J. Ex. 411.

(d) *Re Bowes*, 33 Ch. D. 586; 56 L. J. Ch. 143; *Bock v. Gorrissen*, 30 L. J. Ch. 39.

(e) *Brandao v. Barnett*, 12 Cl. & F. 787.

(f) *Wiltshire v. Great Western Ry.*, L. R. 6 Q. B. 776; 40 L. J. Q. B. 308.

(g) *Mulliner v. Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700.

(h) *Holderness v. Collinson*, 7 B. & C. 212; 6 L. J. K. B. 17; *Bock v. Gorrissen* (*ubi supra*).

(i) *Baring v. Corrie*, 2 B. & Ald., at p. 148; *Stevens v. Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249.

(k) *Naylor v. Mangles*, 1 Esp. 109; 5 R. R. 722; *Spears v. Hartley*, 3 Esp. 81. The lien is for wharfage only, not for other charges: *Holderness v. Collinson* (*ubi supra*).

(l) *Re Witt*, 2 Ch. D. 489; 45 L. J. Bk. 118.

(m) *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; 71 L. J. Ch. 893; *Brandao v. Barnett*, 12 Cl. & F. 787 (bankers).

(n) *Ante*, p. 496.

(o) *Snook v. Davidson*, 2 Camp. 218; 11 R. R. 696; *Mann v. Forrester*, 4 Camp. 660; 15 R. R. 724; and see *Hewison v. Guthrie*, 2 Bing. N. C. 755; 5 L. J. C. P. 283.

A lien exists only in respect of goods received rightfully (p), and from the owner (q) or some person who had authority to give possession of them in order that work might be done upon them (r).

The hirer of a chattel has implied authority from the owner to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used, and a limitation of that apparent authority which is not communicated to the repairer will not deprive him of his lien (s). Thus where repairs are done to chattels let on hire-purchase agreements the repairer has a lien for his charges against the owner even though he knows of the hire-purchase agreement and even though the agreement provides that the hirer shall have no authority to pledge the credit of the owner for repairs to the goods or to create a lien upon them in respect of such repairs, provided that the repairer has no knowledge of that provision (t). An artificer who has, at the request of the hirer, done work upon the hired chattel, cannot retain it as against the letter for hire in exercise of a lien upon it where the hiring agreement is at an end since a lien only arises where the chattel is deposited with the artificer with the consent, express or implied, of its owner (u). Where goods are delivered by the owner to A in order that he may do certain work upon them, and A delivers the goods to B to do part of the work under a sub-contract, no right of lien can be created in favour of B as against the owner, except by his express or implied authority or by a custom of the trade (w).

The right of lien is personal and cannot be transferred (x). It is a right merely to retain possession and not to make any charges in respect of keep or warehousing (y), nor, apart from statute, to sell the goods (z).

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- (p) *Madden v. Kempster*, 1 Camp. 12.  
 (q) *Buxton v. Baughan*, 6 C. & P. 674.  
 (r) *Green v. All Motors, Ltd.*, [1917] 1 K. B. 625; 86 L. J. K. B. 599.  
 (s) *Id.*; *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K. B. 307; 97 L. J. K. B. 25.  
 (t) *Albemarle Supply Co., Ltd. v. Hind & Co.* (*ubi supra*).  
 (u) *Bowmaker, Ltd. v. Wycombe Motors, Ltd.*, [1946] K. B. 505; [1946] 1 All E. R. 113.  
 (w) *Pennington v. Reliance Motor Works*, [1928] 1 K. B. 127; 92 L. J. K. B. 202; see also *Cassels & Co. v. Holden Wood, etc.*, 84 L. J. K. B. 834.  
 (x) *Donald v. Suckling*, L. R. 1 Q. B., at p. 612; 35 L. J. Q. B. 232.  
 (y) *Somes v. British Empire Shipping Co.*, 8 H. L. C. 388; 30 L. J. Q. B. 229.  
 (z) *Thames Ironworks Co. v. Patent Derrick Co.*, 29 L. J. Ch. 714; *Mulliner v. Florence*, 3 Q. B. D., at p. 489; 47 L. J. Q. B. 700 (a case decided before the Innkeepers Act, 1878). A statutory right of sale now exists in the case of innkeepers (*ante*, p. 594), and cases within ss. 492-501 of the Merchant Shipping Act, 1894 (*ante*, p. 625).

The right of lien is lost—

- i. By any discharge of the debt. It is suspended by taking a negotiable instrument as payment, but unless it is taken as absolute satisfaction the debt will revive on its dishonour, even though it is in the hands of assignees for value (a).
- ii. By tender of the debt (b).
- iii. By taking security for the debt under circumstances inconsistent with its continued existence (c).
- iv. By re-delivery of the goods to the owner or his agent (d), unless there is an express agreement that in spite of such re-delivery the lien shall not be lost (e).

#### SUB-SECTION 2.—*Pledges of Goods*

A pledge or pawn is constituted by the delivery of the actual or constructive possession, as security for a debt, of a chattel, or of anything of which possession can be transferred, e.g., a debenture (f), or a negotiable instrument (g), or a bill of lading (h).

The delivery gives to the pledgee a special interest, sometimes

(a) *Gunn v. Bolckow, Vaughan & Co.*, 10 Ch. D. 491; 44 L. J. Ch. 782.

(b) *Lilley v. Barnsley*, 1 C. & K. 344; 70 R. R. 803; *Kerford v. Mondel*, 28 L. J. Ex. 808. In the case of *Albemarle Supply Co., Ltd. v. Hind* the following rules were laid down by Scrutton, L.J., [1928] 1 K. B., at pp. 318, 319: "A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (i) if he has no knowledge or means of knowledge of the right amount; (ii) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed: see *Scarfe v. Morgan* (4 M. & W. 270); *Dirks v. Richards* (4 Man. & G. 574); *Huth & Co. v. Lamport* (16 Q. B. D. 735, 786), per Lord Esher; and *Rumsey v. North Eastern Ry.* (14 C. B. (N.S.) 641, 651, 654), per Erle, C.J., and Willes, J."

(c) *Angus v. McLachan*, 52 L. J. Ch. 567; 23 Ch. D. 330; *Re Taylor, Stillman, and Underwood*, [1891] 1 Ch., at p. 597; 60 L. J. Ch. 525; *Re Douglas, Norman & Co.*, [1898] 1 Ch. 199; 67 L. J. Ch. 85. Where a solicitor takes from his client a security for his costs, the inference, in the absence of evidence to the contrary, is that he has waived his lien (*id.*).

(d) See *Pennington v. Reliance Motor Works, Ltd* (*ubi supra*).

(e) *Albemarle Supply Co., Ltd. v. Hind & Co.* (*ubi supra*).

(f) *Donald v. Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232.

(g) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; 61 L. J. Ch. 723.

(h) *Re David Allester*, [1922] 2 Ch. 211; 91 L. J. Ch. 797.

called a "special property" (i), in the goods, the general property remaining in the pledgor. By virtue of this special interest the pledgee has at Common Law an authority to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee (k).

If, however, the pledgee sells he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own; he must appropriate the proceeds of the sale, which are the pledgor's money, to the payment of the debt, and must account to the pledgor for any surplus after paying the debt; he must take care that the sale is a provident sale, and if the goods are in bulk, he must not sell more than is reasonably sufficient to pay off the debt (l). If it does not produce sufficient to pay the debt, he may sue for the deficiency (m). The pledgee may also sub-pledge the chattel to the extent of his interest (n). He has, however, no right to foreclosure (o).

The rights of the pledgee are extinguished:—

- i. By tender of the debt, after which, if the pledgee refuses or fails to re-deliver the goods, he can be sued in detinue or conversion (p).
- ii. By payment of the amount due, with interest (q). The pledgor has the right to redeem at any time before sale, even though the time fixed for payment has expired (r).
- iii. By re-delivery to the pledgor, unless for a limited purpose only (s).

(i) In the case of *The Odessa*, [1916] 1 A. C. 145; 85 L. J. P. C. 49, it was pointed out that the term "special property" is incorrect; the pledgee has no property, but merely a special interest. His rights arise merely out of the possession which is given to him (*Re Morritt*, 18 Q. B. D., at p. 282; 56 L. J. Q. B. 189), which also enables him to maintain an action of detinue or conversion in respect of the goods: *Swire v. Leach*, 18 C. B. (N.S.) 479; 34 L. J. C. P. 150.

(k) *Ex p. Hubbard*, 17 Q. B. D. 690; 55 L. J. Q. B. 490; *Stubbs v. Slater*. [1910] 1 Ch., at p. 699; 79 L. J. Ch. 420.

(l) *The Odessa*, [1916] 1 A. C., at p. 159.

(m) *Jones v. Marshall*, 24 Q. B. D. 269; 59 L. J. Q. B. 123. This applies also to a pawnbroker who has made a special contract under s. 24 of the Pawnbrokers Act, 1872 (*id.*, and see *post*, p. 702).

(n) *Donald v. Suckling* (*ubi supra*), where the difference between lien and pledge is explained in detail.

(o) *Carter v. Wake*, 4 Ch. D. 605; 46 L. J. Ch. 841; *Stubbs v. Slater* (*ubi supra*).

(p) *Donald v. Suckling* (*ubi supra*); *Harper v. Godsell*, L. R. 5 Q. B., at p. 428; 39 L. J. Q. B. 185, (q) *Swire v. Leach*, 18 C. B. (N.S.), at p. 493.

(r) *Re Morritt* (*ubi supra*); *The Ningchow*, [1916] P., at p. 222.

(s) *Reeves v. Capper*, 5 Bing. N. C. 186; 8 L. J. C. P. 44; and see *North Western Bank v. Poynter*, [1895] A. C., at p. 68; 64 L. J. C. P. 27; *Re David Allester* (*ubi supra*).



*Pawnbrokers.*—A pledge to a pawnbroker for less than £10 is governed by the *Pawnbrokers Acts*, 1872 and 1922 (t); to loans above £10 the Common Law rules still apply (u).

The following are the principal rules laid down by the Acts. A pawnbroker must on taking a pledge in pawn give to the pawner a pawn-ticket and must not take a pledge in pawn unless the pawner takes the ticket (x). Except in the case of a loan exceeding 40s. the profit and charges are fixed by the Act (y), and must be stated on the ticket (z). Every pledge must be redeemed within twelve months from the day of pawning, with seven days of grace, otherwise (i) if the loan does not exceed 10s., it becomes the absolute property of the pawnbroker; and (ii) if the loan is above 10s., it remains redeemable until actual sale (a). A pledge pawned for above 10s. must be sold by public auction, at which the auctioneer may bid and purchase, then becoming absolute owner; but at any time within three years after the auction the holder of the pawn-ticket may inspect the entry of the sale in the pawnbroker's book, and if the sale realised more than the amount of the loan, with the profit due at the time of sale, the pawnbroker must on demand within the three years pay over the surplus, deducting the costs of the sale (b).

In respect, however, of a pledge on which a loan of more than 40s. is made a pawnbroker may make a special contract on a special pawn-ticket, a duplicate of which must be signed by the pawner (c). But by s. 10 (8) of the *Moneylenders Act*, 1927, the powers of a Court under s. 1 of the *Moneylenders Act*, 1900, to reopen transactions of moneylenders extend to any such special contract.

The provisions of the *Moneylenders Acts* do not apply to other business carried on by pawnbrokers in accordance with the *Pawnbrokers Acts* (d), and by s. 14 of the *Moneylenders*

(t) By s. 37 of the Act of 1872 every pawnbroker (*i.e.*, person carrying on the business of taking goods and chattels in pawn (s. 5)) must have a licence.

(u) Act of 1872, s. 10.

(x) *Id.*, s. 14.

(y) *Id.*, s. 15 and Fourth Schedule; *Pawnbrokers Act*, 1922, s. 1.

(z) *Pawnbrokers Act*, 1922, s. 2.

(a) Act of 1872, ss. 17, 18.

(b) *Id.*, ss. 19, 21, 22. The pawnbroker merely sells such rights as he himself had (*Morley v. Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148; 77 R. R. 709; see *ante*, p. 646). If, therefore, the goods have been unlawfully pledged, a purchaser, including the pawnbroker himself, does not have a title as against the true owner: *Burrows v. Barnes*, 82 L. T. 721.

(c) Act of 1872, s. 24.

(d) *Moneylenders Act*, 1900, s. 6 (a).

Act, 1927, it is provided that ss. 6, 12 and 18 of that Act (e) shall not apply to any loan by a pawnbroker on any pledge, or any debt in respect of such loan, although the loan is *not* made in the course of business carried on by him in accordance with the Acts so long as (i) he sends or delivers to the pawner within seven days a note or memorandum containing all the terms of the contract, and showing the date of the loan, the amount of the principal, the interest expressed in terms of a rate per cent. per annum (which must not exceed the rate of 20 per cent. per annum), and any other charges payable by the pawner under the contract, and (ii) the pawner is not charged any sum on account of costs, charges, or expenses, incidental to or relating to the negotiations for the loan or proposed loan other than certain charges specified in the section.

The holder for the time being of a pawn-ticket is presumed to be the person entitled to redeem; and on payment of the loan and profit the pawnbroker must deliver the pledge to the person producing the pawn-ticket, and is indemnified for so doing (f). This, however, applies only between the pawnbroker and the pawner, or an owner who has authorised the pledge, and does not affect the Common Law rights of an owner of property which is pledged against his will so as to prevent him from recovering from the pawnbroker the property itself, or its value, if it has been returned to the pawner, who has redeemed it (g). And, conversely, if a pledgee knows that the pledgor is not the owner, and had no authority to pledge, he may return the pledge to the true owner (h).

When any person is convicted in any Court of stealing or fraudulently obtaining goods, and the same have been pawned, the Court, on proof of the ownership, may order delivery thereof to the owner, either with or without payment to the pawnbroker of all or any part of the loan (i). The Common Law rights of the owner are not affected by such an order, and he may, instead of complying with the order, sue the pawnbroker for the return of the goods (k).

Where a pledge is destroyed or damaged by fire the pawnbroker is liable, on application within the period during which the

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(e) See *ante*, p. 157 (note or memorandum in writing); *ante*, p. 159 (agreements relating to costs); *ante*, p. 282 (limitation of actions).

(f) Pawnbrokers Act, 1872, s. 25.

(g) *Singer Manufacturing Co. v. Clark*, 5 Ex. D. 87; 49 L. J. Ex. 224.

(h) *Cheeseman v. Exall*, 6 Ex. 341; see also 5 Ex. D., at p. 48; 20 L. J. Ex. 209.

(i) Pawnbrokers Act, 1872, s. 30.

(k) *Leicester & Co. v. Cherryman*, [1907] 2 K. B. 101; 76 L. J. K. B. 76.

pledge would have been redeemable, to pay the value of the pledge after deducting the amount of the loan and profit, the value being the amount of the loan and profit and 25 per cent. on the amount of the loan; and he may insure to the extent of the value so estimated. Where a pledge has been depreciated in value through the fault of the pawnbroker, a Court of summary jurisdiction may award compensation to the owner (l).

### SUB-SECTION 3.—*Mortgages of Chattels. Bills of Sale*

**Mortgages of chattels.**—A mortgage of chattels involves, not the delivery of possession, as in the case of a pledge, but the transfer of *property* as security for a debt, and subject to the right of the mortgagor to redeem (m). Mortgages of personal chattels are governed by the Bills of Sale Acts, 1878 and 1882, the latter of which has been slightly modified by amending Acts of 1890 and 1891. The Bills of Sale Act, 1878, applies, however, not only to mortgages, but also to absolute transfers of personal chattels.

**The Bills of Sale Acts.**—A bill of sale is an instrument by which the title to personal chattels is transferred (n) from one person (termed the grantor) to another person (termed the grantee) *either absolutely or by way of security for money*.

The Act of 1878 was intended to prevent creditors from being defrauded by secret assurances of chattels, which were permitted to remain in the ostensible possession of the person who had parted with them, and applies to both kinds of bills of sale, though, as regards bills of sale given by way of security, it is modified by the Act of 1882.

The Act of 1882 was designed to protect borrowers, and applies only to bills of sale given by way of security (o).

**Application of the Acts.**—The Acts apply to every bill of sale “whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to *seize or take possession of any personal chattels* comprised in or made subject to such bill of sale” (p).

(l) Act of 1872, ss. 27, 28.

(m) *Ex p. Hubbard*, 17 Q. B. D., at p. 698; 55 L. J. Q. B. 490; *Re Morritt*, 15 Q. B. D., at p. 282; 56 L. J. Q. B. 139; *Johnson v. Diprose*, [1893] 1 Q. B., at p. 517; 62 L. J. Q. B. 291.

(n) *Marsden v. Meadows*, 7 Q. B. D., at pp. 84, 85; 50 L. J. Ch. 536.

(o) Bills of Sale Act (1878) Amendment Act, 1882, s. 3.

(p) Bills of Sale Act, 1878, s. 3.

*Definition of personal chattels (q).*—This expression includes goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but not chattel interests in real estate, nor fixtures (except trade machinery as defined by the Act (r)) or growing crops when assigned with any interest in the land or building to which they are affixed or the land on which they grow, nor stock, shares, or *choses in action* (s). Fixtures and growing crops are not deemed to be separately assigned or charged when the land passed by the same instrument, merely because they are assigned by separate words or power to sever them is given (t).

*Definition of bill of sale.*—By s. 4 of the principal Act the expression “bill of sale” includes three classes of documents, namely—

- (i) “bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods and other assurances of personal chattels”;
- (ii) “powers of attorney, authorities or licences to take possession of personal chattels as security for any debt”;
- (iii) “any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in Equity to any personal chattels, or to any charge or security thereon, shall be conferred”.

But it does not include the following documents—

- (i) assignments for the benefit of creditors (u);

(q) *Id.*, s. 4.

(r) *Id.*, s. 5. But trade machinery, if affixed to land, passes under a conveyance of the land. Accordingly, an assurance of land including trade machinery (even though expressly mentioned) is not an assurance of personal chattels, unless the trade machinery is assigned by separate words or the assignee has, apart from his powers as grantee of the land, a separate and distinct power to sever it and sell it as something separate and distinct from the land to which it is affixed: *Re Yates*, 38 Ch. D. 112; 57 L. J. Ch. 697; *Brooke v. Brooke*, [1894] 2 Ch. 600; 64 L. J. Ch. 21; *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686; 68 L. J. Ch. 270. By s. 8 of the Agricultural Credits Act, 1928, an “agricultural charge”, as defined by s. 5 of the Act, is not to be deemed a bill of sale within the meaning of the Bills of Sale Acts.

(s) Book debts are accordingly not chattels within the Acts, but a general assignment of book debts must be registered as an absolute bill of sale under s. 48 of the Bankruptcy Act, 1914.

(t) Bills of Sale Act, 1878, s. 7.

(u) *I.e.*, for the benefit of all creditors (*Ex p. Salaman*, [1907] 2 K. B. 170; 76 L. J. K. B. 828. Such assignments are governed by the Deeds of Arrangement Act, 1914.

- (ii) marriage settlements (x);
- (iii) transfers or assignments of any ship or share therein;
- (iv) transfers of goods in the ordinary course of business of any trade or calling (y);
- (v) bills of sale of goods in foreign parts or at sea;
- (vi) bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising its possessor to transfer or receive the goods thereby represented.

The Act of 1890, as amended by the Act of 1891, also excludes certain instruments creating securities on imported goods.

A debenture creating a floating charge on all the property of a company is not a bill of sale under the Act of 1878 (z).

This definition of bills of sale must be read with the previous section, which limits the application of the Act to bills of sale giving power to *seize or take possession* of personal chattels. Neither Act applies where the object and effect of a transaction is immediately to transfer the possession (a). As to the three classes of documents comprised in the definition of bills of sale, the following points must be noted:—

i. As to the first class, in order to constitute a bill of sale there must be an *assurance*—that word qualifying all the preceding words (b).

Thus, in *Re Lovegrove* (c), L. a manufacturer, being short of capital and unable to wait for payments in the ordinary way by his customers, entered into an agreement with a company formed to act as a sales company. L. covenanted not to sell to anyone but the company and the company covenanted not to buy from anyone but L. When L. sold goods to a customer of his the customer was given an invoice bearing the name of the company, which was the vendor to him. The company then paid L. 90 per cent. of

(x) Including a memorandum of agreement for a marriage settlement, though informal and not under seal; *Wenman v. Lyon & Co.*, [1891] 2 Q. B. 192, and also a post-nuptial assignment executed in pursuance of an ante-nuptial deed: *Re Reis, ex p. Clough*, [1904] 2 K. B. 769; 78 L. J. K. B. 929.

(y) The expression "goods" includes growing crops: *Stephenson v. Thompson*, [1924] 2 K. B. 240; 98 L. J. K. B. 771.

(z) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L. J. Ch. 72. It is also expressly excluded from the Act of 1882 (*id.*, s. 17), but, if created by a company registered in England, it must be registered under s. 95 (2) of the Companies Act, 1948.

(a) *Ex p. Close*, 14 Q. B. D., at p. 393; 54 L. J. Q. B. 43; *Ramsay v. Margrett*, [1894] 2 Q. B., at p. 26; 63 L. J. Q. B. 518.

(b) *North Central Wagon Co. v. Manchester, etc., Ry.*, 35 Ch. D., at p. 218; 56 L. J. Ch. 609. Affirmed, 13 App. Cas. 554; 58 L. J. Ch. 219.

(c) [1895] Ch. 464; 104 L. J. Ch. 282.

the price. It was argued that this agreement was a bill of sale, its real substance being that the company lent L. 90 per cent. of the price on the security of the goods. *Held*, that it was not a bill of sale, since there was no assurance to the company of the goods by the agreement.

Moreover, there must be an assurance *constituted by a document*, for the Acts apply only to transactions dependent upon documents, and in which recourse must be had to the document to establish *title (d)*. The document must be an operative part of the transaction, as distinct from being merely evidence or a record of the transaction *(e)*.

If there is a transaction which is complete without any document, and under which the grantee gets a title independently of any document, an agreement in writing which merely records the terms of the transaction or regulates the exercise by the grantee of his rights under that independent title is not a bill of sale; but if the document is intended to be part of the transaction by which the grantee gets his title, then, whatever may be its form, even if it is only a receipt, it is a bill of sale *(f)*.

Thus, in *Ex p. Hubbard*, where goods had been actually deposited as security for a debt, so that a good Common Law pledge was constituted, a document reciting the transaction, and setting out the conditions under which the pledgee might sell the goods, was held not to be a bill of sale, because the pledgee had a good title independently of the document, which merely recorded a completed transaction under which he had actually taken possession, and regulated the exercise of his legal rights under a title already acquired *(g)*.

For this reason also a pawnticket is not a bill of sale *(h)*.

But where a person who has advanced money on the security of goods does not get either actual or constructive possession, but gets merely a document called a "warrant" (not being one of the instruments excepted by the definition) describing the goods

*(d)* *Ramsay v. Margrett (ubi supra)*; *Charlesworth v. Mills*, [1892] A. C., at p. 242; 61 L. J. Q. B. 830.

*(e)* *Charlesworth v. Mills*, [1892] A. C., at p. 239.

*(f)* *Ibid.*, and see *Ramsay v. Margrett (ubi supra)*. Where there is merely a contractual right to obtain possession, and that right can be justified only by an agreement in writing, then the agreement is a bill of sale: *Great Eastern Ry. v. Lord's Trustee*, [1909] A. C., at pp. 116, 117; 77 L. J. K. B. 611.

*(g)* 17 Q. B. D. 690; 55 L. J. Q. B. 490. See also *Newlove v. Shrewsbury*, 21 Q. B. D. 41; 57 L. J. Q. B. 476; *Wrightson v. McArthur & Hutchinsons, Ltd.*, [1921] 2 K. B. 807; 90 L. J. K. B. 842; *Re David Allester*, [1922] 2 Ch. 211; 91 L. J. Ch. 797.

*(h)* *Dublin City Distillery, Ltd. v. Doherty*, [1914] A. C. 823, at p. 855; 83 L. J. P. C. 265.

and stating that they are deliverable to him or his assigns, such document is a bill of sale (i).

So also, if there is a completed sale, a receipt subsequently given is not a bill of sale because it contains an acknowledgment of the sale (k), but although a document may be in form a receipt, if it contains all the terms of the contract between the parties and was intended to embody that contract, it is a bill of sale (l). And where a contract for sale is enforceable only by reason of a memorandum in writing containing the terms of the contract, such memorandum is a bill of sale (m).

ii. A power of distress in an ordinary tenancy agreement is not within the second class of documents; but tenancy agreements between a brewer and the lessee of a tied house, allowing the former to distrain for the price of goods sold by him to the lessee, have been held to amount to licences to take possession of goods as security for debt (n).

By s. 189 of the Law of Property Act, 1925, a power of distress given by way of indemnity against a rent or any part thereof payable in respect of any land, or against the breach of any covenant or condition in relation to land, is not, and shall not be deemed ever to have been, a bill of sale within the meaning of the Bills of Sale Acts.

By s. 6 of the principal Act any attornment, instrument or agreement, not being a mining lease, whereby a power of distress is given by way of security for any present or future debt, and whereby rent is reserved as a mode of providing for payment of interest on such debt or otherwise for the purpose of the security, is *deemed* a bill of sale of any personal chattels which may be taken under the power of distress; but this does not include a mortgage of any interest in land which the mortgagee, being in possession, shall demise to the mortgagor at a fair and reasonable rent.

The effect of the word "deemed" in this section is that such an instrument is not a bill of sale, but is only to be treated as such for purposes of registration. If unregistered, it is void under s. 8 of the Act of 1878, but not being actually a bill of sale it need not be in the form required by the Act of 1882 (o).

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(i) *Dublin City Distillery, Ltd. v. Doherty*, *supra*.

(k) *Ramsay v. Margrett* (*ubi supra*); and see *Preece v. Gilling*, 53 L. T. 768; *Haydon v. Brown*, 59 L. T. 380.

(l) *Re Hood*, 42 W. R. 28.

(m) *Re Roberts*, 86 Ch. D. 196; 56 L. J. Ch. 952.

(n) *Pulbrook v. Ashby*, 56 L. J. Q. B. 376; *Stevens v. Marston*, 60 L. J. Q. B. 192.

(o) *Green v. Marsh*, [1892] 2 Q. B. 380; 61 L. J. Q. B. 442.

It is also only a bill of sale so far as regards personal chattels which may be seized, and, even if unregistered, is not void for all purposes (p). Thus, so far as it creates the relationship of landlord and tenant, it affects merely the land, and is not within the Acts, so that the attornment clause enables the mortgagee to recover possession of the land when rent due under the agreement is in arrear (q).

In a mining lease a power of distress may be given over chattels of the lessee on adjoining mines (r).

To bring a mortgage within the exception in the latter part of the section there must be a *bona fide* lease by a mortgagee in possession, not a pretended lease for the purpose of obtaining a power of distress as a further security for the interest of the mortgage (s).

A genuine hire-purchase agreement is not a bill of sale merely because the owner of the goods reserves a right to resume possession upon default of payment by the hirer, the Acts referring only to licences to take possession which are given by the owner (t).

But a document which purports to be merely a hire-purchase agreement may amount to a bill of sale if it is part of an agreement for, and is intended to secure, a loan.

Thus, in *Mellor's Trustee v. Maas*, A, who had contracted to buy an hotel, and furniture, applied to B for a loan, which was refused. It was then agreed that B should buy the furniture and let it to A on a hire-purchase agreement, under which the property would not pass to A until all the instalments had been paid, and in default of payment B would have the right to resume possession. It was held that the Court must in every case consider not merely the form of the document, but the true nature of the whole transaction; that the real intent was that the hire-purchase agreement should be a security for a loan; and that it was therefore a bill of sale (u).

iii. The third class of documents includes only those giving merely an equitable as distinct from a legal right, as, for example, an agreement to execute a bill of sale to secure payment of a debt, in the event of the debt not being paid within a certain time (w).

Hence it does not apply to a clause in a building contract providing that all materials brought by the builder upon the land

(p) *Re Willis, ex p. Kennedy*, 21 Q. B. D. 384; 57 L. J. Q. B. 634.

(q) *Mumford v. Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552.

(r) *Re Roundwood Colliery Co.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186.

(s) *Re Willis (ubi supra)*.

(t) *Ex p. Crawcour*, 9 Ch. D. 419; 47 L. J. Bk. 94; *McEntire v. Crossley*, [1895] A. C. 457; 64 L. J. P. C. 129.

(u) [1903] 1 K. B. 226; 72 L. J. K. B. 82; affirmed, [1905] A. C. 102; 74 L. J. K. B. 452. See also *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 636; 60 L. J. Q. B. 493; *Johnson v. Rees*, 84 L. J. K. B. 1276.

(w) *Shears & Sons, Ltd. v. Jones*, [1922] 2 Ch. 802; 92 L. J. Ch. 28.



shall become the property of the landowner because, before the materials are brought upon the land, the landowner has no equitable right or interest in them, and as soon as they are brought upon the land the legal property in them passes to him (y).

Any right in respect of chattels to be acquired in the future by the grantor is an equitable right, and future chattels cannot now be assigned by way of security, except under s. 6 (2) of the Act of 1882 (*post*, p. 715), or where there is a covenant to replace existing chattels (z).

**Registration.**—The principal rules as to registration and matters relating thereto are in ss. 8–11 and 22 of the Act of 1878, which, as to security bills, are modified by ss. 8, 10, and 15 of the Act of 1882 (a).

Every bill of sale must be (i) duly attested, (ii) registered, and (iii) must truly (b) set forth the consideration for which it was given (c).

**Consideration.**—The decisions upon “consideration” are very numerous. The general principle is that the facts must be stated with substantial accuracy “either as to their legal effect or as to their mercantile or business effect” (d).

An important matter to be remembered is that money retained by the grantee for interest or expenses connected with the transaction must not be described as paid to the grantor, though money retained with the consent of the grantor in satisfaction of a debt independent of the transaction may be so described, provided that it is an existing debt and not a future debt or liability (e).

It is not untrue to describe the consideration as paid to the grantor if it is paid to someone else at his request (f), and in this case it is immaterial whether it is paid in respect of an existing or a future debt or liability (g).

(y) *Reeves v. Barlow*, 12 Q. B. D. 486; 53 L. J. Q. B. 192.

(z) *Seed v. Bradley*, [1894] 1 Q. B. 319; 63 L. J. Q. B. 387.

(a) As to local registration, see *post*, p. 711.

(b) The word “truly” is contained only in s. 8 of the Act of 1882.

(c) S. 8 (1878); s. 8 (1882).

(d) See *Credit Co. v. Pott*, 6 Q. B. D. 295; 50 L. J. Q. B. 106; *Richardson v. Harris*, 22 Q. B. D., at p. 271.

(e) *Ex p. Firth*, 19 Ch. D. 419; 51 L. J. Ch. 473; *Richardson v. Harris*, 22 Q. B. D. 268; *Darlow v. Bland*, [1897] 1 Q. B. 125; 66 L. J. Q. B. 157; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527; 85 L. J. Ch. 761; *Stott v. Shaw & Lee*, [1928] 2 K. B. 26; 97 L. J. K. B. 556. As to money so retained by moneylenders, see also s. 12 of the Moneylenders Act, 1927, *ante*, p. 159.

(f) *Richardson v. Harris*, 22 Q. B. D., at p. 274.

(g) *Re Wiltshire*, [1900] 1 Q. B. 96; 69 L. J. Q. B. 145.

*Attestation.*—In the case of an *absolute* bill of sale the attestation must be by a solicitor, and must state that, before the execution of the bill, he explained the bill to the grantor (*h*). In the case of a *security* bill this is not necessary, but the attestation must be by one or more credible witnesses, not being parties to the bill (*i*).

*Registration.*—The original bill, with every schedule or inventory annexed or therein referred to, with a true copy (*k*) of the bill, of every schedule or inventory and every attestation, together with an affidavit verifying (*i*) the time when it was given, (*ii*) its due execution and attestation, and (*iii*) the residence and occupation of the grantee and every attesting witness, must be presented to, and the copy and affidavit filed with, the registrar (*l*) within seven clear days after it was given (*m*) (or, in the case of a *security* bill, if it is executed out of England, within seven clear days after the date at which it would arrive in England if posted within seven days after its execution (*n*)); if, however, the seven days expire on a Sunday, or other day on which the office is closed, registration is good if made on the next day (*o*). *Any substantial defect or inaccuracy in the affidavit will render the registration void.*

Here again the cases are too numerous to be dealt with, especially as regards misdescriptions of residence and occupation. The test is whether the description is sufficient for the purposes of identification (*p*). Thus it is erroneous and misleading to describe a person who carries on the business of soap manufacturer as a gentleman of no occupation (*q*), or to describe simply as a married woman a wife living apart from her husband and employed as a manageress of a business (*r*).

(*h*) S. 10 (1) (1878).

(*i*) S. 10 (1882).

(*k*) See *Burchell v. Thompson*, [1920] 2 K. B. 80; 89 L. J. K. B. 533; *Commercial Credit Co. of Canada, Ltd. v. Fulton*, [1923] A. C. 798; 93 L. J. P. C. 12.

(*l*) The Masters of the High Court execute the office of registrar (s. 13 (1882)). Where the district in which the grantor resides or the chattels are situated is outside the London Bankruptcy district the registrar must send to the county court registrar of such district or districts a copy of the bill and every schedule and inventory and for that purpose may require more than one copy to be presented on registration (s. 11 (1882); Administration of Justice Act, 1925, s. 23).

(*m*) S. 10 (2) (1878).

(*n*) S. 8 (1882).

(*o*) S. 22 (1878).

(*p*) *Ex p. MacHattie*, 10 Ch. D., at p. 407; 48 L. J. Bk. 26.

(*q*) *Re Boddington*, 84 L. J. K. B. 2119.

(*r*) *Kemble v. Addison*, [1900] 1 Q. B. 430; 69 L. J. Q. B. 299.

If the bill of sale is subject to any defeasance or condition or declaration of trust not contained in the body thereof, the same is deemed to be part of the bill, and must be written on the same paper therewith before registration, and must be set forth in the copy that is filed, otherwise the registration is void (s).

A defeasance is a collateral stipulation defeating some provision of the bill of sale (t), as, for instance, a collateral agreement that, if the borrower obtains money from any other loan office, the whole loan may be called in as if an instalment had been missed (u).

Examples of conditions are

- (i) a provision that the lender should have recourse to other securities first (w);
- (ii) a stipulation in a promissory note given at the same time as the bill of sale and providing for the same monthly payments, that if default should be made in payment of one instalment, the whole sum unpaid should immediately become due (y);
- (iii) a provision in a mortgage given at the same time as the bill of sale and providing for the same monthly payments, but with compound interest, whereas only simple interest was payable under the bill of sale (z).

This section applies whether the defeasance or condition is in favour of the grantor or the grantee (a). But it applies only to agreements which are part of the bargain, and made before or contemporaneously with the bill of sale and not to those made subsequently (b). The mere fact that a collateral security is given does not, however, vitiate the bill of sale (c).

A transfer or assignment of a registered bill of sale need not be registered; if two or more bills of sale are given in respect of

(s) S. 10 (3) (1878).

(t) *Heseltine v. Simmons*, [1892] 2 Q. B., at p. 558; 62 L. J. Q. B. 5.

(u) *Smith v. Whiteman*, [1909] 2 K. B. 437; 78 L. J. K. B. 1073; *Hall v. Whiteman*, [1912] 1 K. B. 683; 81 L. J. K. B. 660.

(w) *Heseltine v. Simmons* (*ubi supra*).

(y) *Counsell v. London and Westminster, etc., Co.*, 19 Q. B. D. 512; 56 L. J. Q. B. 622; as explained in *Edwards v. Marcus* (*infra*). The promissory note is, however, valid. *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785; 57 L. J. Q. B. 463.

(z) *Edwards v. Marcus*, [1894] 1 Q. B. 587; 63 L. J. Q. B. 368; 70 L. T. 182. Compare *Stott v. Shaw & Lee, Ltd.*, [1928] 2 K. B. 26; 97 L. J. K. B. 556; where it was held that there was nothing in a contemporaneous mortgage which affected the rights on liabilities under the bill of sale.

(a) *Edwards v. Marcus* (*ubi supra*).

(b) *Linford v. Pockett*, [1895] 2 Ch. 885; 64 L. J. Ch. 752; *Lester v. Hickling*, [1916] 2 K. B. 802; 85 L. J. K. B. 1060.

(c) *Carpenter v. Deen*, 23 Q. B. D. 566.

the same chattels they have priority in order of their date of registration (d).

The registration must be renewed every five years by an affidavit stating the date of the bill and the last registration, and the names, residences, and the occupations of the parties, and that it is a subsisting bill (e). Re-registration is not necessary if in the meantime the grantee has taken possession of the goods and has so acquired a title not dependent upon the bill of sale (f).

Upon evidence of the discharge of the debt for which the bill was given, the registrar may order a memorandum of satisfaction to be written upon any registered copy of the bill (g).

Any Judge of the High Court on being satisfied that the omission to register a bill of sale, or an affidavit of renewal, within the prescribed time, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions as to security, notice by advertisement or otherwise, as he thinks fit to direct (h).

- The time for re-registration cannot, however, be extended so as to defeat the rights of an execution creditor (i), or the trustee in bankruptcy of the grantor of the bill of sale (k), in whom the title to the goods has vested in consequence of the failure of the holder of the bill to re-register within the time prescribed by the Act.

To prevent evasion of the Act by the execution of fresh bills of sale within seven days, it is provided that any bill of sale executed within seven days after the execution of an unregistered bill for the same debt or part thereof, and in respect of the same chattels or part thereof, shall be absolutely void, unless proved to have been given bona fide for the purpose of correcting some material error in the prior bill (l).

As regards the result of non-compliance with the rules relating

(d) S. 10 (3) (1878).

(e) S. 11 (1878).

(f) *Re Tooth*, [1894] Ch. 616; 102 L. J. Ch. 315.

(g) S. 15 (1878).

(h) S. 14 (1878). This section applies only to rectification of the register, and a judge has no power to allow a supplemental affidavit to be filed in order to supply particulars inadvertently omitted from the affidavit filed at the time of registration (*Crew v. Cummings*, 21 Q. B. D. 420; 57 L. J. Q. B. 641).

(i) *Crew v. Cummings* (*ubi supra*).

(k) *Re Parsons, ex p. Furber*, [1893] 2 Q. B. 122; 62 L. J. Q. B. 365.

(l) S. 9 (1878).

to registration there are the following differences between absolute and security bills:—

1. By s. 20 of the Act of 1878 chattels comprised in an *absolute* bill of sale which is duly registered are not deemed to be in the possession, order, or disposition of the grantor within the meaning of s. 88 of the Bankruptcy Act, 1914 (m). But so far as concerns *security* bills, this section is repealed by s. 15 of the Act of 1882 (n).

2. By s. 8 of the Act of 1878 an *absolute* bill of sale which is not duly attested or registered, or does not set forth the consideration—

- (a) is deemed fraudulent and *void against certain persons only*, namely, (i) the grantor's trustee in bankruptcy, (ii) the trustee of any assignment for the benefit of creditors, and (iii) an execution creditor or sheriff's officer seizing the chattels in the execution of any process of any court;
- (b) is, even against them, *void only so far as regards any chattels comprised in it which are in the possession or apparent possession of the grantor*.

By s. 4 of the Act of 1878 goods are in the apparent possession of the grantor so long as they are on the premises occupied by him, or are used or enjoyed by him in any place whatsoever, although formal possession may have been taken by someone else. Therefore mere formal possession by a broker's man is not enough. There must be something done "which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them" (o). Where as between husband and wife the situation of the goods is consistent with their being in the possession of either party, the law attributes possession to the party who has the legal title, so that an assurance by a husband to his wife is not affected by this section merely because the goods remain in the house which they both occupy (p).

As to security bills, the above section is repealed by s. 15 of the Act of 1882; and by s. 8 of the latter Act it is provided that a security bill of sale, not duly attested or registered, or not truly setting forth the consideration, shall be *void in respect of the personal chattels contained therein*. In this case the bill of sale

(m) *Ante*, p. 662.

(n) See *Swift v. Pannell*, 24 Ch. D. 210; 53 L. J. Ch. 341; *Heseltine v. Simmons*, [1892] 2 Q. B. 547; 62 L. J. Q. B. 5; *Re Ginger*, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777.

(o) *Ex p. Jay*, 9 Ch. D., at p. 704; 43 L. J. Bk. 122.

(p) *Ramsay v. Margrett*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; see also *French v. Gething*, [1922] 1 K. B. 286; 91 L. J. K. B. 276; *Hislop v. Hislop*, [1950] W. N. 124.

is void as between the grantor and the grantee; and the grantee gets no title to the goods, even though he has taken possession (q), but the grantor is liable on his covenant for payment (r).

**Requisites of form.**—An absolute bill of sale need not be in any particular form. A security bill of sale is governed by s. 9 of the Act of 1882, which provides that every bill of sale given by way of security for the payment of money is void, unless made in accordance with the form prescribed by the schedule to the Act (s).

By s. 4 of the Act of 1882, every security bill must have annexed thereto a schedule containing an inventory of the personal chattels comprised in the bill, and subject to two exceptions in s. 6 is void, except as against the grantor, in respect of any chattels not specifically described in the schedule.

By s. 5 of the Act every security bill is void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill.

To be the "true owner" a person must have a legal or equitable title; accordingly a hirer of chattels who merely has an option to purchase is not the true owner (t). And where a husband and wife, who were together described as "the grantor", gave a bill of sale over chattels which, in fact, belonged to the wife alone, it was held that "the grantor" was not the true owner of the goods (u). But the grantor of a security bill of sale is still, to the extent of his equity of redemption, the true owner of the chattels and may grant a second bill of sale of the same chattels (x). Where, however, a person has a voidable title to goods he is the true owner until his title has been avoided (y).

But, by s. 6 of the Act, nothing in ss. 4 and 5 shall make a bill of sale void in respect of—

- (1) Crops growing at the time of its execution, and separately assigned or charged.
- (2) Fixtures separately assigned, and plant or trade machinery, where such fixtures, plant, or machinery are used in, attached to, or brought on any land or premises

(q) *Ex p. Parsons*, 16 Q. B. D. 532; 55 L. J. Q. B. 187.

(r) *Heseltine v. Simmons*, [1892] 2 Q. B., at pp. 553, 554.

(s) Accordingly, most of the instruments specified in s. 4 of the Act of 1878 cannot be good security bills.

(t) *Lewis v. Thomas*, [1919] 1 K. B. 319; 88 L. J. K. B. 275.

(u) *Gordon v. Goldstein*, [1924] 2 K. B. 779; 94 L. J. K. B. 21.

(x) *Thomas v. Searles*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 72.

(y) *Harrods, Ltd. v. Stanlan*, [1928] 1 K. B. 516; 92 L. J. K. B. 408.

in substitution for those specifically described in the schedule.

The word "plant" means plant in reference to some specific locality, not, *e.g.*, horses of a cab proprietor, which are not used in the premises, but in the streets (z).

By s. 12 of the Act *every security bill given in consideration of any sum under £80 is void.*

*Form of Security Bill Prescribed by the Schedule*

This Indenture made the            day of            between A B of  
of the one part, and C D of            of the other part, witnesseth that in consideration of the sum of £            now paid to A B by C D, the receipt of which the said A B hereby acknowledges [*or whatever else the consideration may be*], he the said A B doth hereby assign unto C D, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £           , and interest thereon at the rate of            per cent. per annum [*or whatever else may be the rate*]. And the said A B doth further agree and declare that he will duly pay to the said C D the principal sum aforesaid, together with the interest then due, by equal            payments of £            on the            day of            [*or whatever else may be the stipulated times or time of payment*]. And the said A B doth also agree with the said C D that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance of defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C D for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882 (a).

In witness, etc.,

Signed and sealed by the said A B in the presence of me E F  
[*add witness' name, address, and description*].

Any substantial divergence from this form renders the bill of sale wholly void as between grantor and grantee, so that the latter cannot sue on the covenant to pay though he can recover the money actually lent (b).

"A divergence is substantial when it departs from the

(z) *London, etc., Discount Co. v. Creasy*, [1897] 1 Q. B. 768; 66 L. J. Q. B. 508.

(a) See post, p. 719.

(b) *Davies v. Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363.

statutory form in anything which is a characteristic of that form" (c), even though it does not alter the legal effect (d), or if it gives the bill of sale a different legal effect or consequence, either greater or smaller, than that which would attach to it if drawn in the proper form (e).

The decisions on this point are very numerous, and only a few illustrations can be given.

The omission of the address and description of the attesting witness (f) or of the receipt clause renders the bill invalid (g).

Where the grantor was expressed to assign "as beneficial owner" it was held that this addition invalidated the bill, as it would, under s. 7 of the Conveyancing Act, 1881, imply covenants for title, which are not provided for by the form (h).

The assignment must be of goods specifically described and capable of present assignment, so that the bill is avoided if, in addition to chattels "specifically described in the schedule", it purports to assign any future or after-acquired property other than fixtures, plant, or trade machinery coming within s. 6 (2) of the Act (i).

The assignment must be of personal chattels only (k). But if the instrument contains two several agreements it may be valid in part. Thus an agreement containing a conditional assignment of (i) a piano, and (ii) a hire-purchase agreement of the piano, was held valid as regards the latter (l). But a document assigning a motor car or the proceeds when sold is one entire assignment, since the proceeds of sale are only assigned as representing the car. Accordingly the equitable assignment of the proceeds cannot be severed from the assignment of the car and is void, unless the document is registered as a bill of sale (m).

(c) *Thomas v. Kelly*, 13 App. Cas., at p. 520; 58 L. J. Q. B. 66.

(d) *Parsons v. Brand*, 25 Q. B. D. 110; 59 L. J. Q. B. 189.

(e) *Thomas v. Kelly*, 13 App. Cas., at p. 517. The section must be construed as prescribing "not only what a bill of sale must contain, but also what it must not contain" (*id.*, at p. 511).

(f) *Parsons v. Brand* (*ubi supra*); *Blankenstein v. Robertson*, 24 Q. B. D. 543; 59 L. J. Q. B. 315.

(g) *Davies v. Jenkins*, [1900] 1 Q. B. 183; 69 L. J., Q. B. 187; *Burchell v. Thompson*, [1920] 2 K. B. 80.

(h) *Ex p. Stanford*, 17 Q. B. D. 259; 55 L. J. Q. B. 341.

(i) *Thomas v. Kelly* (*ubi supra*). Such fixtures, etc., must be mentioned in the schedule, as the form does not contain in the body a substantive description of the chattels (13 App. Cas., at pp. 520, 521).

(k) *Cochrane v. Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418.

(l) *Re Isaacson*, [1895] 1 Q. B. 333; 64 L. J. Q. B. 191; see also *Ex p. Byrne*, 20 Q. B. D. 310; 57 L. J. Q. B. 263.

(m) *National Provincial, etc., Bank of England v. Lindsell*, [1922] 1 K. B. 21; 91 L. J. K. B. 196.



The name and description of the grantee must be given (n).

The consideration must be a definite sum of money, so that a bill of sale given as an indemnity to a surety is void (o).

The interest must also be at a definite rate, and not a lump sum (p), though the alternative contained in the form permits a rate which is not calculated at "per cent. per annum".

The times of payment must be definite, so that a covenant for payment on demand is not within the form (q); but a clause may be added that, if default shall be made in any payment when it becomes due, the whole of the principal and interest then due shall at once become payable (r).

The amounts of the payments, as shown by the alternative contained in the form, need not be equal (s) and they may consist of payments representing both principal and interest, without showing on the face of the instrument how much is applicable to principal and how much to interest (t). Payment may, moreover, be in one entire sum (u).

A bill of sale may be void because it is so complicated in its terms as to differ substantially from the form (x).

No additional covenants may be added, except such as are "for the maintenance or defeasance of the security", as, e.g., covenants to insure (y), to pay rent, rates and taxes and produce receipts, to replace worn-out chattels (z), or, subject to s. 7 of the Act (a), to allow the grantee to seize and sell the goods.

(n) *Alltree v. Alltree*, [1898] 2 Q. B. 267; 67 L. J. Q. B. 882. As to what description is sufficient, see *Simmons v. Woodward*, [1892] A. C. 100; 61 L. J. Ch. 252.

(o) *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J. Q. B. 96.

(p) *Myers v. Elliott*, 16 Q. B. D. 526; 55 L. J. Q. B. 233; *Blankenslein v. Robertson*, *supra*.

(q) *Hetherington v. Groome*, 13 Q. B. D. 789; 53 L. J. Q. B. 577. But a covenant to pay "on or before a fixed date" is not bad: *De Braam v. Ford*, L. R. 4 Ch. 142; 69 L. J. Ch. 82.

(r) *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. J. Ch. 399.

(s) *Re Cleaver*, 18 Q. B. D. 489; 56 L. J. Q. B. 197; *Simmons v. Woodward* (*ubi supra*).

(t) *Linfoot v. Pockett*, [1895] 2 Ch. 835; 64 L. J. Ch. 752; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781; 79 L. J. K. B. 1150.

(u) *Watkins v. Evans*, 18 Q. B. D. 386; 56 L. J. Q. B. 200.

(x) *Melville v. Stringer*, 18 Q. B. D. 392; 53 L. J. Q. B. 182. Here the bill was made between the grantor and four sets of grantees to secure different debts owing to each respectively at different times. See also *Saunders v. White*, [1902] 2 K. B. 472; 71 L. J. K. B. 318, where a bill of sale was held void because there were two grantors and the goods did not belong to them jointly, but some belonged to one grantor and the rest to the other.

(y) *Watkins v. Evans*, 18 Q. B. D. 386; 56 L. J. Q. B. 200. See *Cartwright v. Regan*, [1895] 1 Q. B. 900; 64 L. J. Q. B. 507.

(z) *Seed v. Bradley*, [1894] 1 Q. B. 319; 63 L. J. Q. B. 387; *Consolidated Credit Corporation v. Gosney*, 16 Q. B. D. 24; 55 L. J. Q. B. 61.

(a) *Infra*.

Power may be given to the grantee to pay rent, rates, taxes or insurance in default of proper payment by the grantor and to charge the amount so paid, with interest, upon the chattels; and such a charge does not violate the rule that the consideration must be a specific sum of money (b); but no provision may be made that such amounts may be recoverable by seizure, as such a provision would contravene s. 7 of the Act (c).

The schedule must contain an inventory, in which the personal chattels comprised in the bill of sale must be described with such particularity as is sufficient to identify them, and are usually made for business purposes with regard to the particular subject-matter (d). What is sufficient varies according to the circumstances of the case. Thus chattels belonging to a trader, or farm stock, both of which are ordinarily changed from time to time, require a more specific description than furniture in a private house, which is not so frequently changed. Accordingly, descriptions of a trader's stock as "450 oil paintings in gilt frames" (e), and of farm stock as "21 milch cows", have been held insufficient (f); but a description of books in a private house as follows, "Study, 1,800 volumes of books as per catalogue", was held sufficient as being an assignment of all the books in the study, further described as being 1,800 in number and mentioned in a catalogue (g).

If there is no schedule, the bill is void as not being in proper form (h).

*Seizure of chattels comprised in a bill of sale given by way of security.*—By s. 7 of the Act of 1882, personal chattels comprised in a bill of sale given by way of security can be seized or taken possession of only in the following cases:—

- i. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security.

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(b) *Ex p. Stanford*, 17 Q. B. D. 259; *Goldstrom v. Tallerman*, 18 Q. B. D. 1; 56 L. J. Q. B. 22.

(c) See *Bianchi v. Offord*, 17 Q. B. D. 484; 55 L. J. Q. B. 486; *Real and Personal Advance Co. v. Clears*, 20 Q. B. D. 304; 57 L. J. Q. B. 164.

(d) *Witt v. Banner*, 20 Q. B. D., at p. 118; 57 L. J. Q. B. 141.

(e) *Witt v. Banner* (*ubi supra*).

(f) *Carpenter v. Deen*, 28 Q. B. D. 566. But a description of stock as "Cows, 19 short-horns and 1 Jersey cow" has been held sufficient: *Herbert's Trustees v. Higgins*, [1926] Ch. 794; 95 L. J. Ch. 808.

(g) *Davidson v. Carlton Bank*, [1898] 1 Q. B. 82; 62 L. J. Q. B. 111.

(h) *Griffin v. Union Deposit Bank*, 3 T. L. R. 608.

These last words mean necessary for maintaining the security created by the bill of sale, not merely the maintenance of a sufficient security less than that agreed to be given. "That security is maintained only where the subject-matter of the charge, and the grantee's title to that subject-matter, are both preserved in as good plight and condition as at the date of the bill of sale" (i).

- ii. If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes.

The possession by a grantor of a bill of sale of the goods comprised therein is a possession "by consent of the true owner" within s. 38 (c) of the Bankruptcy Act, 1914 (*ante*, p. 662), and, accordingly, if he becomes bankrupt, will pass to his trustee in bankruptcy if they are in his possession in his trade or business under such circumstances that they are in his reputed ownership (k).

- iii. If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises.
- iv. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes.
- v. If execution shall have been levied against the goods of the grantor under any judgment at law.

And the grantor may, within five days from the seizure or taking of possession for any of these causes, apply by summons to a Judge in Chambers, who, if satisfied that, by payment of money or otherwise, the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just.

Where the grantee takes possession of the goods for the purpose of realising his security by sale of the goods the Judge has jurisdiction to order the security to be given up on payment of the principal, interest to date and costs (l). But no such order can be made when the grantee takes possession merely for the purpose of maintaining his security (m).

By s. 18 all personal chattels seized or taken possession of under any bill of sale must not be removed or sold until the expiration of five clear days from the time of seizure.

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(i) *Furber v. Cobb*, 18 Q. B. D. 494, at p. 509; 56 L. J. Q. B. 273.

(k) *Re Ginger*, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777.

(l) *Ex p. Wickens*, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397.

(m) *Ex p. Ellis*, [1898] 2 Q. B. 79; 67 L. J. Q. B. 784.

By s. 6 a security bill does not protect chattels against distress under a warrant for the recovery of rates and taxes. But it has been held to protect them from liability to *execution* under a judgment for rates (n).

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(n) *Wimbledon Local Board v. Underwood*, [1892] 1 Q. B. 886; 61 L. J. Q. B. 484.

## CHAPTER VI

## NEGOTIABLE INSTRUMENTS

THE law relating to negotiable instruments is, in some respects, a part of the law relating to the assignment of legal choses in action. As has been already explained (a), a legal chose in action can be assigned so as to transfer to the assignee all legal rights and remedies in respect of it. But, as a general rule, the assignment must comply with the requirements of s. 186 of the Law of Property Act, 1925, and is *subject to equities*. Where, however, a legal chose in action consisting in the right to a definite sum of money is created or evidenced by an instrument in writing, such an instrument may be a *negotiable instrument*, the mere delivery of which may operate as an assignment of the chose in action, *free from equities*, so that, contrary to the ordinary Common Law rule, the assignee may have a better title than that of his assignor.

But, in order to produce this effect, three conditions must be fulfilled—

1. The instrument must be one to which this character of negotiability is attached by English law.
2. It must be in such a condition that the mere delivery can operate as a transfer both of the instrument and of the chose in action.
3. The assignee must be what, at Common Law, was described as a “*bona fide* holder for value” (b), and, in the Bills of Exchange Act, 1882 (c), is described as a “holder in due course” (d).

1. *What instruments are negotiable.*—Negotiable instruments are of two classes : (a) those which are negotiable by statute, and (b) those which are negotiable by usage :—

(a) The following are negotiable instruments by statute :—Bills of exchange, cheques and promissory notes, by the Bills of Exchange Act, 1882 (e).

(a) Part I, Chap. V.

(b) *London Joint Stock Bank v. Simmons*, [1892] A. C., at pp. 218, 219; 61 L. J. Ch. 723.

(c) S. 26 (*post*, p. 747).

(d) *I.e.*, in the ordinary and due course of business: *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J. C. P. 33.

(e) But a bill of exchange is not negotiable if it contains words prohibiting transfer (s. 8 (1)), and in the case of a cheque the character of negotiability is lost if it is crossed “not negotiable” (s. 81).

Bills of exchange and cheques were, however, negotiable by the law merchant before their negotiability was declared by statute (f), and promissory notes were previously made negotiable by the Promissory Notes Act, 1704.

East India Company bonds, by the East India Company Bonds Act, 1811 (g).

Dividend warrants issued under the National Debt (Conversion) Act, 1888 (h).

(b) The following have been held to be negotiable instruments by usage:—Exchequer bills (i), bank notes (k), share warrants (l), circular notes (m), scrip to bearer (n), and bearer debentures (o). Some foreign bearer bonds have also been held to be negotiable instruments. With regard to these, however, it must be noticed that they can become negotiable only by English commercial usage (p), though, as in the case of English instruments, modern usage is sufficient (q).

Bills of lading (r), post office orders (s), and share certificates (t) are not negotiable instruments, nor is an IOU, which is merely evidence of an account stated (u); nor is a document which is a mere receipt (x).

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(f) For their origin and history, see the judgment of Cockburn, L.C.J., in *Goodwin v. Roberts*, L. R. 10 Ex., at pp. 346, 358. They were in use in Italy from the twelfth century, and from there found their way into France and then to England. Their use was at first confined to foreign bills between English and foreign merchants: it was then extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.

(g) See *Crouch v. Crédit Foncier*, L. R. 8 Q. B., at p. 388.

(h) *Id.*, s. 80 (5), by which they are to be deemed cheques. Warrants for the payment of interest on 5 per cent. War Stock 1929-47 are in form cheques and are also warrants for the payment of a dividend within s. 95 of the Bills of Exchange Act, 1882, as to which see *post*, p. 770; *Slingsby v. Westminster Bank, Ltd.*, [1931] 1 K. B. 173; 100 L. J. K. B. 195.

(i) *Wookey v. Pole*, 4 B. & Ad. 1.

(k) *Miller v. Race*, 1 Burr. 452.

(l) *Webb, Hale & Co. v. Alexandra Water Co.*, 98 L. T. 339; 21 T. L. R. 572.

(m) *Conflans Quarry Co. v. Parker*, L. R. 3 C. P. 1; 37 L. J. C. P. 51.

(n) *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; 46 L. J. Q. B. 346; *Goodwin v. Roberts* (*ubi supra*).

(o) *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; 67 L. J. Q. B. 987; *Edelstein v. Schuler*, [1902] 2 K. B. 144; 71 L. J. K. B. 572.

(p) *Picker v. London and County Bank*, 18 Q. B. D., at p. 518; 56 L. J. Q. B. 299; *Williams v. Colonial Bank*, 38 Ch. D., at p. 404; 57 L. J. Ch. 826. See also *Colonial Bank v. Cady*, 15 App. Cas. 267; 60 L. J. Ch. 131.

(q) See cases in note (o), *supra*.

(r) *Ante*, p. 619.

(s) *Fine Art Society v. Union Bank of London*, 17 Q. B. D. 705; 56 L. J. Q. B. 70.

(t) *Colonial Bank v. Cady*, 15 App. Cas. 267; 60 L. J. Ch. 131.

(u) *Fesenmayer v. Adcock*, 16 M. & W., at p. 450.

(x) *Jones & Co. v. Coventry*, [1909] 2 K. B. 1029; 79 L. J. K. B. 41.

2. *When they are negotiable.*—Even if an instrument is of a kind which is negotiable it must be in such a condition as to be transferable by delivery. It must, therefore, either be payable to bearer, or, if payable to order, it must be indorsed by the holder before he transfers it (y).

8. *Bona fide holder for value. Holder in due course.*—In order that an assignee may be a *bona fide* holder for value or holder in due course

- i. He must have taken the instrument for value, and
- ii. He must have taken it in good faith without notice of any defect in the title of the person from whom he took it (z). To constitute him a holder in due course within the Bills of Exchange Act, 1882, he must also comply with the remaining requirements of s. 29 of that Act (a). By s. 90 of the Bills of Exchange Act, 1882, which is declaratory of the Common Law (b), “a thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not”. But negligence, when considered in connection with the surrounding circumstances, may be evidence of bad faith; and one circumstance of importance is the adequacy of the amount paid for the negotiable instrument (c). Notice includes not only the actual knowledge of the facts but a suspicion that there is something wrong, whether or not it is a suspicion of what the particular wrong is, coupled with a refusal to make inquiry lest that suspicion should be confirmed (d). The doctrine of constructive notice does not apply to negotiable instruments, but “if there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry” (e). Mere carelessness or foolishness in

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(y) *Whistler v. Forster*, 32 L. J. C. P. 161; 14 C. B. (N.S.) 248; *Good v. Walker*, 61 L. J. Q. B. 786; Bills of Exchange Act, 1882, s. 31. As to forged indorsements, see *post*, p. 741.

(z) *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J. C. P. 83; *London Joint Stock Bank v. Simmons* (*ubi supra*).

(a) *Post*, pp. 746, 747.

(b) See *London Joint Stock Bank v. Simmons* (*ubi supra*).

(c) See *Re Gomersall*, 1 Ch. D., at pp. 146, 149; 47 L. J. Bk. 1.

(d) *Jones v. Gordon*, 2 App. Cas., at p. 629; 47 L. J. Bk. 1.

(e) *London Joint Stock Bank v. Simmons*, [1892] A. C., at p. 221; 61 L. J. Ch. 728.

not suspecting is not, however, sufficient to prevent a man from being a holder in due course (f).'

Two important cases on this point may be noted :—

In *Sheffield v. London Joint Stock Bank* (g), a moneylender, having advanced money to his own clients upon the security of negotiable instruments, deposited them with a bank as security for a greater amount than he himself had advanced upon them. The bank knew the nature of his business and that he was in the habit of lending money upon such securities. *Held*, that, as it had knowledge of facts calculated to arouse suspicion, it was put upon inquiry as to the "moneylender's authority to deal with the securities"; it could therefore have no greater right over them than the moneylender himself, and must give them up on payment of the amount for which they were pledged to the moneylender by his clients.

In *London Joint Stock Bank v. Simmons* (h), a broker fraudulently deposited with a bank, as security for an advance to himself, negotiable instruments belonging to his clients. The securities were taken by the bank in the ordinary course of their business with the broker, and the bank did not know whether they belonged to the broker or to his clients or whether he had any authority to dispose of them, and it made no inquiries. *Held*, that as there were in fact no circumstances calculated to arouse suspicion that the broker had no right to deal with the securities, the bank was not put upon inquiry, and was therefore a holder in due course.

A negotiable instrument may therefore be defined as an instrument creating or evidencing a chose in action consisting in the right to a definite sum of money, and of such a kind and in such a condition that all rights in respect of that chose in action can be assigned by the mere delivery of the instrument and can be exercised by an assignee who is a *bona fide* holder for value, or, in the case of bills of exchange, cheques and promissory notes, a holder in due course, notwithstanding any defect in, and free from any equity attaching to, the title of his assignor.

The most important negotiable instruments are bills of exchange, cheques and promissory notes, with regard to which the law was codified by the Bills of Exchange Act, 1882 (i).

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(f) *Jones v. Gordon* (ubi supra); *Raphael v. Bank of England* (ubi supra).

(g) 13 App. Cas. 333; 57 L. J. Ch. 986.

(h) *Ubi supra*.

(i) Unless otherwise stated the references in this chapter are to the Act. The cross-references in the text should be noted.



## SECTION 1.—BILLS OF EXCHANGE

SUB-SECTION 1.—*Form and Interpretation* (k)

**Definition of bill of exchange.**—A bill of exchange is “an (1) *unconditional* (2) *order* (8) *in writing* (4) *addressed by one party to another* (5) *signed by the person giving it* (6) *requiring* (7) *the person to whom it is addressed* (8) *to pay* (9) *on demand or at a fixed or determinable future time* (10) *a sum certain in money* (11) *to or to the order of a specified person or to bearer*” [s. 3 (1)].

A *cheque* is a bill of exchange drawn on a banker payable on demand and, *except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque* [s. 79].

“An *inland bill* is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands; or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.”

For the purposes of the Act the term “British Islands” means any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to them, being part of His Majesty’s Dominions [s. 4 (1)] (l). Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill [s. 4 (2)].

If no place of payment is specified the bill is payable at the address of the drawee (m).

A foreign bill, if dishonoured, must be protested, but this is not necessary in case of an inland bill (n), except as a preliminary to resort to a referee in case of need (o).

*Forms of a Cheque and Bill of Exchange*

## 1 (Cheque).

No. B 55078

London, January 1st, 1987.

NATIONAL BANK OF ENTERPRISE, LIMITED,

1475 Southbury Street, E.C.5.

Pay

William Vendor

or Order

Five Hundred Pounds.

£500.

Henry Purchaser.



(k) The Act is divided into parts, with sub-divisions dealing with different subject-matters, e.g., Form and Interpretation, Capacity and Authority of Parties, Consideration, etc., and particular sections must be construed according to the subject-matter, e.g., Form and Interpretation, Capacity and Authority of Parties.

(l) The Irish Free State is not now part of the United Kingdom.

(m) S. 45 (4), *post*, p. 754

(n) S. 51, *post*, p. 758.

(o) Ss. 15, 65, 67, *post*, pp. 736, 764, 765.

## 2 (Bill Payable to Third Person).

£500.

London, January 1st, 1987.



Three months after date pay to William Vendor or  
Order the sum of *Five Hundred Pounds*, for value  
received (p).

To *Alfred Jones*,  
1284 Sixth Avenue, Liverpool.

*Henry Purchaser.*

## 3 (Bill Payable to Drawer).

£500.

London, January 1st, 1987.



Three months after sight pay to *my Order* the sum  
of *Five Hundred Pounds*, for value received.

To *Henry Purchaser*.  
5678 Tenth Avenue, Manchester.

*William Vendor.*

These forms explain the preceding definitions, with which they should be compared.

The first form is an order, addressed by a purchaser of goods, who is the *drawer*, to a bank, which is the drawee, requiring the bank to pay the sum of £500 to the vendor, who is the *payee*. Since no time for payment is expressed it is, by s. 10 of the Act, payable *on demand*, and therefore complies with the definition of a *cheque* in s. 78 of the Act. Since it is *crossed*, the bank will not pay it otherwise than to another bank. Upon receiving it the vendor indorses it, so becoming an *indorser*, and may then either obtain payment through a bank or may *negotiate* it to some one else, who becomes the *holder* of it and can, in turn, either negotiate it again, or obtain payment through a bank. If, upon presentment to the bank on which it is drawn, the cheque is not paid, the holder will have a right of action, not only against the drawer, but also, after giving *notice of dishonour*, against any indorser who did not, by his indorsement, expressly negative or limit his liability (q).

An *indorsement* may be *in blank* or *special*. An *indorsement in blank* is effected by the simple signature of the indorser on the back of the cheque, which then becomes payable to bearer and may be negotiated by simple delivery. A *special indorsement*

(p) These words, though usual, are not required by the statutory definition; see s. 3 (4), *post*, p. 730.

(q) S. 16, *post*, pp. 736.

is one which specifies a particular person to whom the cheque is to be paid, *e.g.*,

*Pay Edward Robinson.  
William Vendor.*

Edward Robinson is then an *indorsee* and must, in his turn, indorse the cheque before he can negotiate it.

A cheque or other bill of exchange or a promissory note is *negotiated* only when it is transferred so as to constitute the transferee *the holder* (r), and thus to give him the rights which, under the Act, are possessed by a holder and which vary according as he is either a *holder*, or a *holder for value*, or a *holder in due course*.

The term *holder* does not include everyone who is in possession of a bill or note, but only a person in possession of a bill or note of which he is the payee or indorsee or which is payable to bearer [s. 2].

It can, however, include a person whose possession is unlawful (*e.g.*, a person who has stolen a bill payable to bearer), but who, nevertheless, has, under the Act, certain rights and powers.

In the second form the purchaser, desiring to have credit, has drawn a bill of exchange addressed to Jones requiring him to pay in three months the sum of £500 to the vendor. Here again the purchaser is the drawer and the vendor is the payee, and may either negotiate the bill or may hold it until the expiration of the three months and then obtain payment from Jones, who is the drawee. But Jones is not liable upon the bill until he has become the *acceptor* thereof by signing his name thereon in accordance with the Act (s). Accordingly the vendor, upon receiving the bill will, in general, present it to Jones for acceptance. If, upon this *presentment for acceptance*, he fails to obtain an acceptance in accordance with the Act, the bill is *dishonoured by non-acceptance* and, after giving notice of dishonour to the purchaser, he will have an immediate right of action against him for the amount of the bill.

If the bill is accepted by Jones he becomes the person

(r) S. 81, *post*, pp. 748.

(s) "A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bills fall due, or because [in the case of an accommodation bill] he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft" (*Bank of England v. Vagliano*, [1891] A. C., at p. 147; 60 L. J. Q. B. 145). But, even though a drawee is in possession of funds of the drawer, he is not bound to accept unless he has contracted to do so (*Goodwin v. Roberts*, L. R. 10 Ex., at p. 351; and see *Smith v. Brown*, 6 Taunt., at p. 844. Note, however, s. 19 (3) of the Sale of Goods Act, 1893 (*ante*, p. 656).

primarily liable to pay it, but, if it has been negotiated, the drawer and indorsers are also jointly and severally liable to the holder, their position being analogous to that of sureties (t). Accordingly, when the time for payment arrives, *presentment for payment* is made to Jones by the person who is then the holder. If Jones then fails to pay the bill it is *dishonoured by non-payment* and the holder will have an immediate right of action against him and also, if *notice of dishonour* has been given to them, against the drawer and indorsers, and may sue all or any of them.

It must, however, be noticed that it is no part of the definition of a bill of exchange that it should be accepted, and the vendor may therefore indorse and negotiate the bill before it is accepted by Jones. In that case he and any subsequent indorsers may become liable to the holder but Jones will be under no liability.

In the third form the vendor himself draws on the purchaser. Here the vendor is the drawer, the purchaser is the drawee and, if he accepts, becomes the acceptor. The vendor is also the payee and can, as already explained, either hold the bill until the time for payment arrives, or, after indorsing it, can negotiate it to some other person.

Alternatively the vendor may require the purchaser to pay the sum of £500 to a third party as payee. This course may sometimes be more convenient (e.g., if the vendor is abroad and both the purchaser and the party to whom payment is to be made are in England), as the third party can thus at once become the "holder" of the bill without the necessity of returning it to the vendor for his indorsement.

It must be noted that since a bill of exchange is a written document, no evidence can be given of any contemporaneous oral agreement varying its terms (u). But the whole facts and circumstances attendant upon the making, issue and transferenc<sup>e</sup> of a bill of exchange may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it (w).

A bill of exchange or promissory note must be properly

(t) See *Duncan Fox & Co. v. N. & S. Wales Bank*, 6 App. Cas. 1; 50 L. J. Ch. 355.

(u) *New London Credit Syndicate v. Neal*, [1898] 2 Q. B. 487; 67 L. J. Q. B. 825.

(w) See *Macdonald v. Whitfield*, 8 App. Cas. 788; 52 L. J. P. O. 70 (post, p. 761); *McDonald & Co. v. Nash*, [1924] A. C. 625; 98 L. J. K. B. 610; *Elliott v. Baz-Ironside*, [1926] 2 K. B. 301; 94 L. J. K. B. 807; *National Sales Corporation v. Bernardi*, [1981] 2 K. B. 188.

stamped, otherwise it is void and is not even admissible as evidence of the receipt of the money for which it was given (y).

**Form.**—An instrument which does not comply with the conditions of form required by s. 8 (1) (*ante*, p. 726), or which requires any act to be done in addition to the payment of money, is not a bill of exchange [s. 3 (2)].

An instrument which is not valid as a bill of exchange may, however, have other effects. It may, for example, operate as an equitable assignment of a chose in action.

But “a bill is not invalid by reason (a) that it is not dated; (b) that it does not specify the value given, or that any value has been given; (c) that it does not specify the place where it is drawn or the place where it is payable” [s. 3 (4)].

As to filling in a date, see ss. 12 and 20 (z).

The following requirements of s. 8 (1) demand particular attention.

**Unconditional order.**—A bill must be *unconditional* as between the drawer and drawee. Thus, in order to “pay to A, provided that the receipt form at the foot is duly signed, stamped, and dated” is an order imposing upon the drawee a condition as to payment which prevents the instrument from being a bill of exchange (a).

This rule applies also to cheques (b). But a notice added at the foot of the bill, directed to the *payee*, and requiring him to sign a receipt at the back, does not make the bill conditional as between drawer and drawee (c). Nor does a direction to the payee to retain the bill until another is sent, this also merely making it conditional as between drawer and payee (d).

“An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account

(y) *Ashling v. Boon*, [1891] 1 Ch. 601; 60 L. J. Ch. 306; *Foster v. Driscoll*, [1929] 2 K. B., at p. 487; 98 L. J. K. B. 282. But by s. 38 (2) of the Stamp Act, 1891, a bill payable on demand, or at sight, or on presentation (*e.g.*, a cheque) may be presented for payment unstamped, and be stamped by the person to whom it is presented for payment.

(z) *Post*, pp. 735, 740.

(a) *Bavins v. London and South Western Bank*, [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655.

(b) See *Underwood, Ltd. v. Bank of Liverpool*, [1924] 1 K. B., at p. 792; 93 L. J. K. B. 690.

(c) *Nathan v. Ogdens, Ltd.*, 93 L. T. 553; 21 T. L. R. 775.

(d) *Roberts v. Marsh*, [1915] 1 K. B. 82; 84 L. J. K. B. 338.

to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional" [s. 3 (3)].

Thus, an order to pay "out of the freight as you receive it" is not unconditional, because the payment depends upon the receipt of the freight, but an order to pay "on account of moneys advanced by me for the X company" is unconditional, because it merely states the transaction giving rise to the bill and denotes the consideration for the order (e). And an order to pay "as my quarterly half pay" is not conditional, because it merely indicates a particular fund out of which the drawer is to reimburse himself (f).

*Addressed by one person to another.*—"Where in a bill drawer and drawee are the same person (g), or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note" [s. 5 (2)].

"The drawee must be named or otherwise indicated in a bill with reasonable certainty" [s. 6 (1)].

Thus, an instrument in the form of a bill, but addressed to no one, is not a bill of exchange, and, if A writes an acceptance thereon, he is not liable as the acceptor of a bill of exchange, but he is liable as the maker of a promissory note (h). But a bill not containing the name of a drawee, but expressed to be payable at a particular address, is meant to be addressed to the person living at that address and, if he accepts it, he is liable as an acceptor (i).

"A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the *alternative* or to two or more drawees in *succession* is not a bill of exchange" [s. 6 (2)].

*Signed by the person giving it.*—It is not necessary for this, or any other signature required by the Act, that a person should sign with his own hand, but it is sufficient if his signature is written by some other person by his authority. In the case of a corporation it is sufficient if the bill is sealed with the corporate seal, but it is not necessary that it should be under seal [s. 91].

*Payable to or to the order of a specified person or to bearer.*—A bill may be drawn payable either to bearer or "to" or "to the

(e) *Griffin v. Weatherby*, L. R. 3 Q. B. 785; 37 L. J. Q. B. 280.

(f) *Macleod v. Snee*, 2 Stra. 762; *Stevens v. Hill*, 5 Esp. 247.

(g) As, e.g., where a firm has two branches, one of which draws on the other, see *Re British Trade Corporation*, [1932] 2 Ch. 1; 101 L. J. Ch. 278.

(h) *Peto v. Reynolds*, 9 Ex. 410; 23 L. J. Ex. 98; *Mason v. Lack*, 140 L. T. 696; 45 T. L. R. 363. See also *Faseldine v. Winstanley*, [1936] 2 K. B. 101.

(i) *Gray v. Milner*, 8 Taunt. 379; *Peto v. Reynolds* (*ubi supra*).

order of " a specified person. When it is not drawn payable to bearer the specified person may be (i) the drawer (as in Form 8), or (ii) a third person (as in Forms 1 and 2), or (iii) in some cases the drawee himself (k).

\* "Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."—

Where, therefore, in a document in the form of a cheque, the space intended for the name of the payee was filled in merely with the word "cash", so that it read, "Pay cash or order", it was held that the document was not payable either to a specified person or to bearer and was not a cheque (l).

"A bill may be payable to two or more payees jointly or it may be payable in the alternative to one of two, or one or some of several payees. A bill may also be payable to the holder of an office for the time being" [s. 7 (1) (2)].

"Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer" [s. 7 (3)].

An existing person may be a fictitious person within the meaning of the Act if his name is inserted as payee merely by way of pretence and without any intention on the part of the drawer that he shall receive any benefit. Thus, in the case of *Bank of England v. Vagliano* (m), the respondent, Vagliano, was in the habit of accepting bills drawn on him by one of his customers in favour of particular payees. One of his clerks forged bills in this form which were accepted by Vagliano payable at the Bank of England where he had a banking account. The clerk then forged the indorsements of the persons named as payees and obtained payment in cash from the bank, which debited Vagliano with the amounts so paid. The question in the case accordingly was whether the bank was entitled to do this or had paid away Vagliano's money under such circumstances as to enable him to refuse to acknowledge the payments as made on his behalf. It was held that, since the names of the payees were inserted merely for the purpose of making the bills complete in form and by way of pretence only without any intent that they should receive payment, they were fictitious payees and the bills could accordingly be treated as payable to bearer, and were therefore properly paid by the bank which was entitled to debit Vagliano with the amount (n).

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(k) S. 5 (1). A bill may sometimes be drawn payable to the drawee, e.g., "Pay to your own order". This, however, is possible only where the drawee acts in two capacities. See Chalmers' Bills of Exchange, note s. 5 (1).

(l) *North and South Insurance Corporation v. National Provincial Bank, Ltd.*, [1936] 1 K. B. 328; 105 L. J. K. B. 168.

(m) [1891] A. C. 107; 60 L. J. Q. B. 145.

(n) It was also held that Vagliano was liable because his conduct had induced the bank to pay the bills.

So also, if a person is induced to draw a cheque payable to the order of a person whom he believes to be real and to be his creditor, but who does not in fact exist, the cheque will be treated by virtue of the above-cited section as payable to bearer (o). But if a tradesman is induced to draw cheques to the order of actual customers, in payment of sums which his clerk falsely tells him are owing to those customers, these cheques will not be treated as payable to bearer; so that, where the clerk who had made such representation then stole the cheques which had accordingly been drawn and forged the indorsements and got an innocent tradesman to cash them, the drawer of the cheques was held entitled to recover their value from the tradesman (p).

“When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties, but is not negotiable.”

“A negotiable bill may be payable either to order or to bearer” [s. 8 (1) (2)].

In the Act the words “negotiate” and “negotiation” denote transfer by delivery, or indorsement and delivery, whether or not the transfer is free from equities (see s. 31, *post*, p. 748).

If a bill (as distinct from a cheque) is crossed “not negotiable” it is within s. 8 (1), and is not transferable (pp).

In order to prevent the bill from being negotiable the words prohibiting transfer must be in the bill as drawn, not in the acceptance (q).

“A bill is payable to *bearer* which is expressed to be so payable, or on which the only or the last indorsement is an indorsement in blank” [s. 8 (3)].

As to indorsement in blank, see s. 34, *post*, p. 749.

“A bill is payable to *order* which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option” [s. 8 (4) (5)].

(o) *Clutton v. Attenborough*, [1897] A. C. 90; 66 L. J. Q. B. 221.

(p) *Vinden v. Hughes*, [1905] 1 K. B. 785; 74 L. J. K. B. 410; *North and South Wales Bank v. Macbeth*, [1908] A. C. 187; 77 L. J. K. B. 464.

(pp) *Hibernian Bank v. Gysin and Hanson*, [1899] 1 K. B. 438; 108 L. J. K. B. 214. On the other hand, if a cheque is crossed “not negotiable” it falls within s. 81 (*post*, p. 770) and remains transferable but subject to equities.

(q) See *Meyer v. Decroix*, [1891] A. C. 520; 61 L. J. Q. B. 205; *National Bank v. Silke*, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199.



The result of these two sub-sections is that a bill has the same effect whether it is drawn (i) "pay to John Smith or order", or (ii) "pay to John Smith" (provided that it does not contain words prohibiting transfer, etc.), or (iii) "pay to the order of John Smith".

- A bill drawn payable to "— order" is equivalent to a bill payable to "my order", and is valid when indorsed by the drawer (r).

*Sum certain in money.*—"The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

"(a) With interest.

"(b) By stated instalments.

"(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

"(d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill".

"Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

"Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill; and if the bill is undated, from the issue thereof" [s. 9 (1) (2) (3)].

The word "issue" means "the first delivery of a bill or note, complete in form to a person who takes it as a holder" [s. 2].

*On demand, or a fixed or determinable future time.*—"A bill is payable on demand—

"(a) which is expressed to be payable on demand, or at sight, or on presentation; or

"(b) in which no time for payment is expressed."

"Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand" [s. 10 (1) (2)].

"A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

"1. At a fixed period after date or sight.

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(r) *Chamberlain v. Young*, [1898] 2 Q. B. 206; 63 L. J. Q. B. 28.

"2. On, or at a fixed period after, the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain."

"An instrument expressed to be payable on a contingency is not a bill, and the happening of the contingency does not cure the defect" [s. 11].

Thus, a bill is valid if made payable—

- (i) ten days after the death of X (s);
- (ii) twelve months after notice (t).

But it is invalid if made payable—

- (i) on the day of A's marriage (u);
- (ii) on the arrival of a ship at its destination (x).

**Rules as to the date.**—"Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance and the bill shall be payable accordingly (y). Provided that—

1. Where the holder in good faith and by mistake inserts a wrong date, and
2. In every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course

the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date" [s. 12].

"Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be."—"A bill is not invalid by reason only that it is ante-dated or post-dated or that it bears date on a Sunday" [s. 13 (1) (2)].

**•Computation of time.**—"Where a bill is *not payable on demand*, the day on which it falls due is determined as follows:—

(s) *Coleham v. Cooke*, Willes 393.

(t) *Clayton v. Gosling*, 5 B. & C. 360; 4 L. J. (o.s.) K. B. 176.

(u) *Beardesly v. Baldwin*, 2 Stra. 1151.

(x) *Palmer v. Pratt*, 2 Bing. 185; 3 L. J. (o.s.) C. P. 250.

(y) This section, as between immediate parties, does not apply to a case where an agreement provides the date from which the bill is to run, irrespective of the date of the bill or the sight of the bill, as "ninety days from November 26", and a date which is not November 26 is inserted in the bill as the date from which the ninety days are to run: *Foster v. Driscoll*, [1929] 1 K. B., at p. 496; 98 L. J. K. B. 282; i.e., the date inserted is deemed to be the true date.

"1. Three days, called *days of grace*, are in every case where the bill does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace" (s).

"2. Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment" (a).

"8. Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery."

4. The term "month" in a bill means "calendar month" [s. 14 (1) (2) (3) (4)].

**Case of need.**—"The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit" [s. 15].

Thus, if a foreign vendor of goods draws upon a purchaser in England for the price, making the bill payable to a payee in England, he may provide against the possibility of a refusal by the drawee to accept or pay the bill by inserting therein the name of some agent of his own to whom, upon such refusal, the payee may apply for payment. The referee in case of need is not a party to the bill. A bill must be protested or noted for protest before it can be presented to the referee in case of need (b).

**Special stipulations by a drawer or indorser.**—"The drawer of a bill, and any indorser, may insert therein an express stipulation—

"1. Negating or limiting his own liability to the holder."

"2. Waiving as regards himself some or all of the holder's duties" [s. 16].

(s) But (a) "Where the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day" (*ibid.*).

(a) *E.g.*, a bill dated January 1 and payable three months after date is not due and payable until April 4.

(b) See s. 87, *post*, p. 765.

Thus, an indorser may add to his indorsement the words "*sans recours*" or "without recourse to me". He thus transfers his interest in the bill without incurring any liability as an indorser in the event of its dishonour. This is called a qualified indorsement. An indorsement waiving the holder's duties is called a facultative indorsement.

**Acceptance.**—"The acceptance of a bill is the signification by the *drawee* of his assent to the order of the drawer" [s. 17 (1)].

Acceptance in the Act means "acceptance completed by delivery or notification": [s. 2].

Except in the case of an acceptance for honour no one but the drawee can be liable as acceptor (c), for the bill is, in point of form, invalid unless the acceptance is by the drawee. Thus—

i. A bill is drawn upon A and accepted by A, but B also purports to accept it: B is not liable as an acceptor (d).

So, where a bill drawn on a firm was accepted in the firm name, it was held that the additional signature by one of the partners of his own name did not make him personally liable (e).

ii. If a bill is drawn upon a principal, his agent cannot be liable as acceptor (f).

iii. Conversely, a bill drawn upon an agent, although it describes him as agent for a named principal, can be accepted only by the agent, who is then personally liable, even though his acceptance is expressed to be on behalf of his principal (g).

So, in *Herald v. Connah* (h), a bill was drawn on "C, general agent of the X Company", and accepted "on behalf of the Company, C". Held, that C was personally liable as acceptor.

"An acceptance is invalid unless it complies with the following conditions:—

(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(c) *Polhill v. Walter*, 3 B. & Ad., at p. 122; 1 L. J. K. B. 92. As to acceptance for honour, see *post*, p. 764.

(d) *Jackson v. Hudson*, 2 Camp. 447; *Bult v. Morrell*, 12 Ad. & El. 745; 10 L. J. Q. B. 52.

(e) *Re Barnard*, 32 Ch. D. 447; 55 L. J. Ch. 937.

(f) *Polhill v. Walter*, 3 B. & Ad. 114; 1 L. J. K. B. 92; 37 R. R. 344.

(g) *Mare v. Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119; 103 E. R. 881; *Herald v. Connah*, 34 L. T. 885.

(h) *Ubi supra*.

- (b) It must not express that the drawee will perform his promise by any other means than the payment of money" [s. 17 (2)].

The acceptance is written across the face of the bill, and, where the bill is payable *after sight*, should be dated.

"A bill may be accepted (i) before it has been signed by the drawer, or while it is otherwise incomplete; (ii) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment.—When a bill payable *after sight* is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance" [s. 18 (1) (2)].

"An acceptance is either (a) general or (b) qualified" [s. 19 (1)].

The holder may refuse to take a qualified acceptance: see s. 44, *post*, p. 753.

"A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. *In particular* an acceptance is qualified which is—

- "(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated (*e.g.*, accepted—payable on giving up bills of lading (i));
- "(b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
- "(c) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere;

The word 'only' in the foregoing provision is emphatic. Where an acceptance stated that it was to be payable at a place mentioned in a foreign country, and in the currency of that country, it was held that the acceptance was not local but general (j).

- "(d) qualified as to time (*e.g.*, a bill drawn payable two months after date is accepted payable six months after date);

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(i) See *Smith v. Vertue*, 30 L. J. C. P. 56; 9 C. B. (N.S.) 214.

(j) *Banku Polski v. Muldar & Co.*, [1942] 1 K. B. 497; 111 L. J. K. B. 481.

“ (e) the acceptance of some one or more of the drawees, but not of all ” [s. 19 (2)].

Where a bill is drawn upon two or more drawees jointly, an acceptance by one is a qualified acceptance which binds him personally. And the name of a firm is equivalent to the names of all the partners so that a bill addressed to a firm has the same effect as if it were addressed to all the partners: an acceptance by one partner only is therefore a qualified acceptance which binds him personally (k).

**Delivery.**—“ Every contract on a bill, whether it be the drawer’s, the acceptor’s, or an indorser’s, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. Provided that where an acceptance is written on a bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable ” [s. 21 (4)].

The word “ delivery ” means “ transfer of possession, actual or constructive, from one person to another ” [s. 2].

“ As between immediate parties (l), and as regards a remote party other than a holder in due course, the delivery—

“ (a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be;

“ (b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

“ But if the bill be in the hands of a holder in due course a *valid* delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed ” [s. 21 (2)].

“ Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved ” [s. 21 (3)].

**Inchoate instruments.**—“ Where a simple signature on a blank stamped paper is delivered by the signer *in order that it may be converted into a bill*, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or

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(k) *Owen v. Van Uster*, 10 C. B. 818; 20 L. J. C. P. 61.

(l) I.e., parties who are in a direct and immediate relationship to each other, e.g., the drawer and the acceptor, or an indorser and the next indorsee.

the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit."—"In order that any *such* instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact."—"Provided that if any *such* instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given" [s. 20 (1) (2)]. (m).

As to this section two points must be noted. Firstly, the blank stamped paper must be *delivered* by the signer, so that, if a man signed a blank cheque which was stolen and subsequently filled up, he would not be liable upon it (n). Secondly, it must be delivered in order that it may be converted into a bill, so that the section would not apply if the blank stamped paper were handed to an agent, not with the intention that it should be negotiated, but with directions that it was to be kept to await further instructions (o). It must also be noted that this section, though "based on the doctrine of Common Law estoppel" (p), does not in any way narrow that doctrine (q), and therefore, quite independently of the Act, a person who signs a negotiable instrument in blank or with blank spaces and hands it to another person to be filled up and negotiated is, as against a *bona fide* holder for value without notice, liable for the amount for which it may be filled up, although it has been fraudulently filled up contrary to his express directions (r).

On this point two cases may be compared, in neither of which s. 20 of the Act applied.

In *Smith v. Prosser* (s), A, being about to leave South Africa for a visit to England, signed his name on two blank *unstamped* forms of promissory notes and left them with an agent to be retained until instructions were given for filling up the amounts

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(m) For a full explanation of this section, see *McDonald & Co v. Nash*, [1924] A. C. 625; 98 L. J. K. B. 610. As to authority to fill in the date, see s. 12, *ante*, p. 735.

(n) *Baxendale v. Bennett*, 3 Q. B. D. 525; 47 L. J. Q. B. 624.

(o) See *Smith v. Prosser*, [1907] 2 K. B., at pp. 753, 754; 77 L. J. K. B. 71. In such cases it would, therefore, appear that s. 21 (3), *supra*, would have no application.

(p) [1907] 2 K. B., at p. 753.

(q) *Lloyds Bank, Ltd. v. Cooke*, [1907] 1 K. B. 794; 76 L. J. K. B. 666.

(r) *Id.*

(s) *Ubi supra*.

and using them. No instructions were ever given by A, but the agent fraudulently filled up the blanks for considerable amounts and sold them to B who took them in good faith and for value. *Held*, that as A handed the forms to the agent merely as custodian, he was not estopped from denying the agent's authority to fill them up.

In *Lloyds Bank, Ltd. v. Cooke* (t), A signed his name on a blank stamped paper which he entrusted to B with authority to fill it upon as a promissory note for £250, payable to C, and to deliver it to C as security for an advance to be made by C. B fraudulently filled up the note for £1,000, C having no notice of the fraud. *Held*, that, although s. 20 of the Act did not apply, because there is no "negotiation" of a promissory note to the payee, A was estopped from disputing the validity of the note.

**A date must be filled in within a reasonable time (u).**

#### SUB-SECTION 2.—*Capacity and Authority of Parties*

**Capacity.**—"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract."—"Where a bill is drawn or indorsed by an infant . . . or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto" [s. 22 (1) (2)].

An infant cannot be sued upon a bill, even though given for necessities (x). A corporation cannot be sued upon a bill unless it has express or implied power to draw, indorse, or, accept bills (y).

**Signature.**—"No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

"(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

"(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm" [s. 23].

**Forged, etc., signatures.**—"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without

(t) *Ubi supra*.

(u) In *Griffiths v. Dalton*, [1940] 2 K. B. 264. it was held that a year was too long in the case of a cheque.

(x) *Re Soltykoff*, [1891] 1 Q. B. 418; 60 L. J. Q. B. 389; *ante*, p. 182.

(y) *Ante*, pp. 146-148.



the authority of the person whose signature it purports to be, the forged or unauthorised signature is *wholly inoperative*, and *no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any other party thereto can be acquired through or under that signature*, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery" [s. 24] (z).

A banker who pays a *cheque* on a forged indorsement is specially protected by the Act (a).

A person whose signature has been forged cannot ratify it (b), but he can for valuable consideration adopt it, and he may be estopped from repudiating it (c).

Thus, in *Greenwood v. Martins Bank* (d), a wife repeatedly forged her husband's name to cheques and drew from his bank money which she used for her own private purposes. Her husband failed to inform the bank of this for eight months after he became aware of it, at the end of which period his wife died. As a result of his silence the bank was prevented from bringing an action against him and his wife for her tort because at her death any cause of action against him ceased to exist. *Held*, (i) that the husband was under a duty to disclose the forgeries to the bank, (ii) that his silence therefore amounted to a misrepresentation, (iii) that in consequence of such misrepresentation the bank had suffered detriment, and (iv) that he was therefore estopped from denying the genuineness of his signature.

But a cheque signed by an agent having authority to sign is not a forgery merely because his authority to sign is fraudulently misused by him for his own purposes, and his signature may therefore be ratified (e).

**Procurator signature.**—"A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent so signing was acting within the actual limits of his authority" [s. 25].

Where an employee, in payment of his betting debts, gives cheques signed *per pro.* his employer, the payee has notice that

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(z) The provisions referred to in the first line of this section are contained in ss. 54 and 55, *post*, pp. 759, 760, and ss. 60, 80 and 82, *post*, pp. 772, 778.

(a) S. 60, *post*, p. 772.

(b) *Brook v. Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(c) *Roberts v. Tucker*, 16 Q. B., at p. 577; 20 L. J. Q. B. 270; *Greenwood v. Martins Bank*, [1933] A. C. 51; 102 L. J. K. B. 224. See also *Kreditbank Cassel v. Schenkers, Ltd.*, [1927] 1 K. B. 826; 96 L. J. K. B. 501.

(d) *Ubi supra*.

(e) *Morrison v. London County and Westminster Bank*, [1914] 3 K. B. 356; 83 L. J. K. B. 1202.

the cheques are drawn for purposes outside the business of his employer, who is not therefore liable in the absence of evidence that the employee had actual authority to draw such cheques (f).

**Signatures by agents, etc.**—"Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability" [s. 26 (1)].

If a party to a bill or note merely describes himself as an agent, but does not state on the face of the instrument that he is signing for, or on account of, some company or body of which he is the agent, then he is personally liable (g).

Thus, if a person signs "A B, Director of the X Company, Limited", he merely describes himself and is personally liable. If he wishes to escape liability he must sign "For the X Company, Limited, A B, Director" (h).

But, if an agent indicates plainly by the method of his signature that he is signing for or on behalf of a principal, he is not as a general rule personally liable, except (i) where he accepts a bill drawn on him personally (i); (ii) in cases within section 108 of the Companies Act, 1948, under which any officer of a limited company who signs on behalf of the company any bill of exchange, promissory note or cheque, in which the name of the company is not mentioned as required by the Act, is personally liable to the holder for the amount unless it is paid by the company (k). If, however, an agent signs without having authority to do so he may be sued in an action of deceit if he knew that he had no authority and otherwise upon a warranty of authority (l).

"In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted" [s. 26 (2)].

It is sometimes difficult to determine whether a signature by

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(f) *Morrison v. Kemp*, 29 T. L. R. 70.

(g) *Dutton v. Marsh*, L. R. 6 Q. B., at p. 384; 40 L. J. Q. B. 175; *Elliot v. Baz-Ironside* (*infra*).

(h) See and compare *Chapman v. Smethurst*, [1909] 1 K. B. 927; 78 L. J. K. B. 654; *Landes v. Marcus*, 25 T. L. R. 478.

(i) *Ante*, p. 737.

(k) See also *ante*, p. 480.

(l) *Ante*, p. 479.

an agent is the signature of the principal by the hand of his agent, or whether it is the signature of an agent who is merely describing himself as an agent. In such cases it must, if possible, be construed so as to give validity to the bill. Thus, if a bill is drawn upon an agent, an ambiguous acceptance will, if possible, be construed as the acceptance of the agent in order to give validity to the bill (m).

Thus, in *Elliott v. Bar-Ironside* (n), a bill drawn on a limited liability company called the Fashions Fair Exhibition, Ltd., was accepted by two directors, with the name of the company following their signatures, and was indorsed as follows: "Fashions Fair Exhibition, Ltd., A B, C D, Directors", the name of the company being impressed by a rubber stamp above the names of the directors. It was held (i) that the construction that the signatures on the back were the personal signatures of the directors was the one most favourable to the validity of the instrument in the hands of a holder, because, on this construction, the personal liability of the directors was added to the existing liability of the company; (ii) that the word "Directors" was a word of description only. It was held also that evidence might be given of the circumstances of the case and of letters that had passed between the plaintiff and the defendants, in order to show that the defendants A B and C D had intended to undertake personal liability (o).

### SUB-SECTION 3.—*Consideration*

"Valuable consideration for a bill may be constituted by

"(a) any consideration sufficient to support a simple contract;

"(b) an antecedent debt (p) or liability" [s. 27 (1)].

Where a bill of exchange is given for an antecedent debt it operates *prima facie* only as a conditional payment (q).

Notice the following observations upon s. 27 (1) (b) :—

(i) The proper construction of the words "antecedent

(m) *Mare v Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119; and see *Herald v. Connah*, 34 L. T. 822.

(n) [1925] 2 K. B. 301; 94 L. J. K. B. 807.

(o) See *ante*, p. 729.

(p) Where the secretary of a company owed money to the defendant (the chairman of the company) in the action, and fraudulently persuaded the defendant to accept bills on the false pretence that they were for the purposes of the company, and negotiated the bills to the plaintiff in the action, it was held that so far as consideration was concerned the antecedent debt due from the secretary to the defendant was sufficient to support the bills. The plaintiff, however, failed on other grounds: *Ayres v. Moore*, [1940] 1 K. B. 278; 109 L. J. K. B. 91.

(q) *Currie v. Misa*, L. R. 10 Ex., at pp. 163, 164; 1 App. Cas. 554. See *ante*, p. 216.

debt or liability" is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have been *prima facie* the result at common law by which the giving of a cheque for an amount for which the drawer was already indebted imported no consideration since the obligation was passed.

- (ii) The case of *Crears v. Hunter* (r), decides that, where the debt or liability is that of a third party, one must find something in the transaction sufficient at the very least to connect the receipt of the bill with the antecedent debt or liability, and to provide within the meaning of paragraph (a) of this sub-section some consideration for the cheque in the form of forbearance or a promise to forbear, express or implied, on the part of the recipient of the cheque in regard to the third party's antecedent debt or liability.
- (iii) In some cases, particularly where the bill or cheque given has been post-dated, the Court has, in the absence of express evidence, readily implied a promise, at any rate during the interval before the post-dated bill or cheque becomes payable, not to press the claim against the debtor.
- (iv) However, the sub-section does not say that, where there is an antecedent debt or liability even on the part of the giver of the cheque, that is, without more, in every case and necessarily valuable consideration for the bill. Certainly, in the case where the debt or liability is that of a third party, the matter is a question of evidence (s).

**Holder for value.**—The term "holder for value" includes not only a person who has himself given value, but also other persons who, by the Act, are deemed to be holders for value.

Thus, "where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties thereto prior to such time" [s. 27 (2)].

By s. 2 the term "value" means valuable consideration.

A bill of exchange is a simple contract, and as between immediate parties the absence of consideration is a defence.

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(r) (1887), 19 Q. B. D. 341.

(s) *Oliver v. Davis*, [1949] 2 K. B. 727; [1949] L. J. R. 1861, C. A.

But a party to a bill who has himself received no value may be sued by a subsequent holder who has given value to an *intermediate* party. Thus A, the holder of a bill, negotiates it to B, without receiving value; B negotiates it to C for value; A cannot set up as against C that he has received no consideration, though he can do so as against B.

And where a holder for value negotiates a bill he transfers with it all his own rights of action. Thus A, the holder for value of a bill, negotiates it to B without receiving value; B has all A's rights of action against any prior parties to the bill (t), though he has no rights of action against A (u).

And "where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien" [s. 27 (3)].

It may be noticed that a bank is not a holder for value of a cheque paid in by its customer for collection merely because on the day on which it receives the cheque it enters the value on the credit side of his account. To constitute value there must in such a case be a contract between banker and customer, express or implied, that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against cheques paid in for collection; such a contract can, however, be established by course of business and may be established by entry in the customer's pass book, communicated to the customer and acted upon by him (v).

Conversely, the existence of such a contract may be rebutted by notices in the customer's pass book and in paying-slips, or other evidence to show that the customer could not draw against the cheques until they were collected (w).

**Accommodation parties.**—"An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person."—"An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not" [s. 28 (1) (2)].

The person accommodated impliedly undertakes to take up the bill when it becomes due, and to indemnify the accommodation party (x).

(t) *Milnes v. Dawson*, 5 Ex. 948; 20 L. J. Ex. 81.

(u) *Holliday v. Atkinson*, 5 B. & C. 501; 29 R. R. 299; *Re Whitaker*, 42 Ch. D. 119; 58 L. J. Ch. 487.

(v) *Underwood, Ltd. v. Barclays Bank*, [1924] 1 K. B. 775; 93 L. J. K. B. 690.

(w) *Re Farrow's Bank*, [1923] 1 Ch. 41; 92 L. J. Ch. 153.

(x) *Reynolds v. Doyle*, 1 Man. & G. 753.

**Holder in due course.**—A holder in due course is a *holder* (y) who has taken a bill—

- i. Complete and regular on the face of it.
- ii. Before it was overdue.
- iii. Without notice of any previous dishonour.
- iv. In good faith and
- v. For value and
- vi. Without notice, at the time when it was negotiated to him, of any defect in the title of the person who negotiated it to him [s. 29 (1)] (z).

Note that, since a holder in due course must be a person to whom the bill was negotiated (s. 31, *infra*), the original payee of a cheque is not a holder in due course (a).

“In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud” [s. 29 (2)].

Note that this section deals only with persons whose title is defective and not with a person who has no title, as, e.g., a person who takes under a forged indorsement (see s. 24).

“A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that time” [s. 29 (3)].

Thus, A obtains a cheque from B by fraud and indorses it to C, who takes it as a holder in due course. C indorses it to D, who knows how it was obtained, but was no party to the fraud. D has all the rights of a holder in due course against B (b).

**Presumptions of value and good faith.**—“Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value” (c).—“Every holder of a bill is *prima facie* deemed to be a holder in due course; but, if in an action on a bill it is admitted or proved that the acceptance,

(y) That is to say a “holder” as defined by s. 2, see *ante*, pp. 728, 729.

(z) As to “notice”, see *ante*, p. 724.

(a) *Jones v. Waring & Gillow*, [1926] A. C. 670; 95 L. J. K. B. 918.

(b) See *May v. Chapman*, 16 M. & W. 355.

(c) S. 30 (1). But this is only a presumption, which may be rebutted: *Holliday v. Atkinson*, 5 B. & C. 501.

issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud, or illegality, value has in good faith been given for the bill " (d).

#### SUB-SECTION 4.—*Negotiation of Bills*

**Negotiation.**—A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the *holder* of the bill.—A bill payable to bearer is negotiated by delivery.—A bill payable to order is negotiated by the indorsement of the holder completed by delivery [s. 31 (1) (2) (3)] (e).

Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor [s. 31 (4)].

But the transferee has no right to indorse for the transferor (f). *And he is affected by notice of any fraud received before indorsement by the transferor (g).*

"Where any person is under obligation to indorse a bill in a representative capacity, he may indorse a bill in such terms as to negative personal liability" [s. 31 (5)].

See also s. 16 and s. 26 (h).

**Indorsement.**—The indorsement must be "written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient" [s. 32 (1)] (i).

It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees *severally*, does not operate as a negotiation of the bill.

(d) S. 30 (2).

(e) "Indorsement" is defined by s. 2 of the Act as "indorsement completed by delivery".

(f) *Harrop v. Fisher*, 10 C. B. (N.S.) 196; 30 L. J. C. P. 283.

(g) *Whistler v. Forster*, 14 C. B. (N.S.) 248; 32 L. J. C. P. 161.

(h) *Ante*, pp. 736, 743.

(i) Where no room exists on the bill for further indorsements they may be written on an "*allonge*", i.e., a slip of paper attached to it.

Where a bill is payable to the order of two or more payees or indorseees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding if he think fit his proper signature.

Where there are two or more indorsements on the bill, each indorsement is deemed to have been in the order in which it appears on the bill, until the contrary is proved [s. 32 (2) (3) (4) (5)].

The intention of a person to make himself a party to a bill will not be defeated merely because he indorses in the wrong place. So, in *Bernardi v. National Sales Corporation* (k), the indorsement of a drawer of a bill was held to be good although by inadvertence it was placed below, instead of above, the indorsement of a third party.

An indorsement may be—

- (i) *In blank*, i.e., by the simple signature of the indorser without specifying any indorsee; a bill so indorsed becomes payable to bearer [s. 34 (1)].

See also s. 8 (8) *ante*, p. 738.

- (ii) *Special*, i.e., specifying the person to whom, or to whose order, the bill is to be payable [s. 34 (2)].

The provisions of ss. 7 and 8 relating to payees (*ante*, pp. 732, 738) apply with the necessary modifications to an indorsee under a special indorsement [s. 34 (3)].

Where a bill has been indorsed in blank any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person [s. 34 (4)].

- (iii) *Restrictive*, i.e., an indorsement "which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D only' or 'Pay D for the account of X' or 'Pay D or order for collection'".

"A restrictive indorsement gives the indorsee the

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(k) See *Bernardi v. National Sales Corporation*, [1981] 2 K. B. 188; 47 T. L. R. 380.



right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so ”.

“ Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement ” [s. 35 (1) (2) (3)].

But an indorsement may *not be conditional*. “ If a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not ” [s. 33].

**Duration of negotiability.**—“ Where a bill is negotiable in its origin, it continues to be negotiable until it has been (a) restrictively indorsed; or (b) discharged by payment or otherwise ” [s. 36 (1)].

As to when a bill is negotiable in origin, see s. 8 (*ante*, p. 733).

**Negotiation of overdue bills and dishonoured bills.**—“ Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had ” [s. 36 (2)].

Compare s. 29 (1), *ante*, p. 747.

“ A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact ” [s. 36 (3)].

This sub-section applies to cheques [s. 73], but not to promissory notes [s. 86 (3)].

“ Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue ” [s. 36 (4)].

“ Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course ” [s. 36 (5)].

**Negotiation of bill to party already liable thereon.**—"Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of the Act (1), re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable" [s. 37].

**Rights of the holder.**—"The rights and powers of the holder of a bill are as follows :—

"(1) He may sue on the bill in his own name :

"(2) Where he is a *holder in due course*, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :

"(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill" [s. 38].

Refer to definition of "holder" (s. 2, *ante*, p. 728). Note again that a holder *for value* is not necessarily a holder in due course. For defects of title, see s. 29 (2), *ante*, p. 747.

#### SUB-SECTION 5.—*General Duties of the Holder*

A bill may, after acceptance, or even before acceptance, pass through the hands of numerous transferees; and there are certain duties the non-performance of which may deprive a holder of his rights : these duties relate to (1) Presentment for acceptance; (2) Presentment for payment; (3) Notice of dishonour; (4) Noting and protesting.

**1. Presentment for acceptance.**—This is necessary in three cases only—

- i. Where a bill is payable *after sight*; here it is necessary in order to fix the maturity of the bill :
- ii. Where a bill expressly stipulates that it shall be presented for acceptance :
- iii. Where it is drawn payable elsewhere than at the residence or place of business of the drawee [s. 39].

When a bill payable *after sight* is negotiated, the holder must either present for acceptance or negotiate it within a reasonable

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(1) *I.e.*, the provisions as to discharge in ss. 59-64.

time.—If he do not do so, the *drawer* and all *indorsers* prior to that holder are discharged. “In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case” [s. 40 (1) (2) (3)].

“The presentment must be made by or on behalf of the holder to the drawee or some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue: where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept for all: where the drawee is dead presentment may be made to his personal representative, and when he is bankrupt either to him or his trustee: where authorised by agreement or usage a presentment through the post office is sufficient [s. 41 (1)].

Non-business days are Sunday, Good Friday, Christmas Day, bank holidays under the Bank Holidays Act, 1878, or Acts amending it, and any day appointed by Royal Proclamation as a public fast or thanksgiving day. Any other day is a business day. Where by the Act the time limited for doing any act or thing is less than three days, non-business days are excluded in reckoning time [s. 92].

Presentment is excused and a bill may be treated as dishonoured by non-acceptance—

- (a) where the drawee is dead, bankrupt, a fictitious person or a person not having capacity to contract by bill;
- (b) where, after the exercise of reasonable diligence, presentment cannot be effected;
- (c) where, although the presentment was irregular, acceptance has been refused on some other ground.

But the fact that the holder has reason to believe that the bill, on presentment, will be dishonoured, does not excuse presentment [s. 41 (2) (3)] (m).

*Dishonour by non-acceptance.*—“When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the *drawer* and *indorsers*” [s. 42].

In the case of ordinary trade bills the customary time is twenty-four hours (n), excluding non-business days.

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(m) But where an attempt to procure acceptance would be illegal, it may be dispensed with: *Cornelius v. Banque Franco-Serbe*, [1942] 1 K. B. 29; 110 L. J. K. B. 573, a case on s. 46 (2) (a), *post*, p. 755.

(n) “Reasonable time” is determined in the same way as under s. 40 *supra*.

A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by the Act is refused or cannot be obtained.

As to the requisites of a valid acceptance, see ss. 17 and 19 (*ante*, pp. 787-789).

- (b) When presentment for acceptance is excused and the bill is not accepted [s. 43 (1)].

“Subject to the provisions of the Act, when a bill is dishonoured by non-acceptance, an immediate right of *recourse* against the drawer and indorsers accrues to the holder and no presentment for payment is necessary” [s. 43 (2)].

The provisions of the Act to which reference is made are s. 15 (*ante*, p. 786), and ss. 65-68 (*post*, p. 764-765), relating to acceptance for honour. If the holder obtains an acceptance for honour his rights against the drawer and indorsers are suspended. Note that although a right of *recourse* accrues to the holder of the bill upon its dishonour, no right of *action* accrues until he has given notice of dishonour, and, when it is necessary, has protested the bill (*post*, p. 758).

*Qualified acceptances.*—“The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance” [s. 44 (1)].

As to qualified acceptances, see s. 19, *ante*, p. 738.

“Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.”

“The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given.” But “where a foreign bill has been accepted as to part, it must be protested as to the balance”.

“Where the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto” [s. 44 (2) and (3)].

2. *Presentment for payment.*—If a bill is not duly presented for payment the *drawer* and *indorsers* are discharged.

If the bill is not payable on demand presentment must be made on the day it falls due.

If it is payable on demand presentment must be made within a reasonable time (o) after its issue in order to render the drawer liable, and within a reasonable time after its indorsement to render an indorser liable.

Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place, to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if such person can there be found.

The proper place of presentment is (a) the place of payment specified in the bill; or (b) if no place is specified, the address of the drawee or acceptor specified in the bill; or (c) if no such place or address is specified, the place of business of the drawee or acceptor, if it is known, or otherwise his residence, if known; or (d) in any other case presentment may be made to the drawee or acceptor wherever he can be found, or at his last known place of business or residence.

Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawer or acceptor is required.

Where a bill is drawn on, or accepted by, two or more persons who are not partners, and no place of payment is specified, presentment must be made to all.

Where the drawee or acceptor is dead and no place of payment is specified, presentment must be made to a personal representative, if such there be and with the exercise of reasonable diligence he can be found.

Where authorised by agreement or usage presentment through the post office is sufficient [s. 45 (1)–(8)] (p).

Delay in making presentment for payment is excused if it is caused by circumstances beyond the control of the holder and not due to his default, misconduct, or negligence; but when the cause of delay ceases to operate presentment must be made with reasonable diligence [s. 46 (1)].

Presentment for payment is excused—

- (a) where, after the exercise of reasonable diligence, it cannot be effected.

But the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured,

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(o) "Reasonable time" is determined in the same way as under s. 40, (*ante*, p. 752).

(p) Compare carefully with s. 41 (1), *ante*, p. 752.

- does not dispense with the necessity for presentment (q);
- (b) where the drawee is a fictitious person;
  - (c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;
  - (d) as regards an indorser, where the bill was accepted or made for his accommodation, and he has no reason to expect that the bill would be paid if presented;
  - (e) by express or implied waiver of presentment [s. 46 (2)] (r).

Waiver may be made in the bill itself, or subsequently, *i.e.*, before or after maturity. If made before maturity, it must be clear (s). An instance of waiver after maturity is furnished by a case in which a party liable wrote to the holder asking for time to pay (t).

*Dishonour by non-payment.*—"A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained; (b) when presentment is excused and the bill is overdue and unpaid" [s. 47 (1)].

"Subject to the provisions of the Act, when a bill is dishonoured by non-payment, an immediate right of *recourse* against the drawer and indorsers accrues to the holder" [s. 47 (2)].

As to the difference between right of *recourse* and right of action, see *ante*, p. 758.

The provisions to which reference is made are s. 15 (*ante*, p. 730), and ss. 65-68, which deal with acceptance and payment for honour, *post*, p. 764.

3. Notice of dishonour.—When a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: Provided that—

(q) But where the "diligence" would be illegal, it may be dispensed with, *e.g.*, where the drawee of a cheque was in enemy territory: *Cornelius v. Banque Franco-Serbe*, [1942] 1 K. B. 29; 110 L. J. K. B. 578.

(r) Compare carefully with s. 41 (2) (3), *ante*, p. 758.

(s) *Britannia Electric Lamp Works v. Mandler*, [1939] 2 K. B. 129; 108 L. J. K. B. 828.

(t) *Hopley v. Dufresne*, 15 East 275.

- “(1) Where a bill is dishonoured by *non-acceptance*, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.
- “(2) Where a bill is dishonoured by *non-acceptance*, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted” [s. 48].

Notice of dishonour is governed by the following rules :—

It must be given by or on behalf of a holder or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

If it is given by or on behalf of the holder it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

If it is given by or on behalf of an indorser who is entitled to give notice it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given [s. 49 (1) (3) (4)].

If a bill is indorsed by A (drawer), and then by B, C, D, and E, the holder can sue only those who have received notice of dishonour, and he should therefore give notice to all whom he wishes to sue; but if he gives notice to E, who in turn gives notice to D, he can sue D, and so on. Moreover, a notice given by the holder to A or B can be taken advantage of by C, D, E, and subsequent holders, and a notice given by E to A or B can be taken advantage of by C, D, and the holder.

The notice may be given by an agent, either in his own name or in the name of any party entitled to give notice whether that party be his principal or not [s. 49 (2)].

Mere knowledge that the bill has been dishonoured is not sufficient but the notice requires no special form and may be verbal or in writing, provided that it sufficiently identifies the bill and intimates that it has been dishonoured by non-acceptance or non-payment. The return of a dishonoured bill to the drawer or an indorser is sufficient notice. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication; and a misdescription of the bill does not vitiate the notice unless the party to whom it is given is misled thereby [s. 49 (5) (6) (7)] (u).

Notice may be given to a party himself or to his agent; if a

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(u) See *Fielding & Co. v. Corry*, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7.

party is dead it must be given to his personal representative; if he is bankrupt it may be given either to himself or to his trustee; if there are two or more drawers or indorsers who are not partners, notice must be given to all unless one has authority to receive it for the others [s. 49 (8)-(11)].

Notice may be given as soon as the bill is dishonoured and must be given within a reasonable time. If the person giving and the person to receive notice reside in the same place, the notice must be given or sent off in time to reach the latter on the day after dishonour; if they reside in different places the notice must be sent off on the day after dishonour, if there is a post at a convenient hour on that day—otherwise by the next post thereafter. Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable or may give notice to his principal; if he gives notice to his principal, he must do so within the same time as if he were a holder and his principal then must give notice within the same time as if the agent had been an independent holder [s. 49 (12)-(14)] (a).

If notice is received on a non-business day it is deemed to have been received on the day following (y).

Delay in giving notice of dishonour is excused when it is caused by circumstances beyond the control of the party giving it and is not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence [s. 50 (1)].

Notice of dishonour is dispensed with :—

(a) When after the exercise of reasonable diligence it cannot be given or does not reach the party sought to be charged.

(b) By waiver, either express or implied, and either before the time for giving notice or after omission to do so.

(c) As regards the drawer—

- (i) where drawer and drawee are the same person;
- (ii) where the drawee is a fictitious person, or a person not having capacity to contract;
- (iii) where the drawer is the person to whom the bill is presented for payment;
- (iv) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill;
- (v) where the drawer has countermanded payment.

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(x) *Ibid.*

(y) See *ante*, p. 752.



(d) As regards the indorser—

- (i) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill;
- (ii) where the indorser is the person to whom the bill was presented for payment;
- (iii) where the bill was accepted or made for his accommodation [s. 50 (2)].

**Noting and protesting.**—Where an *inland* bill has been dishonoured, it may, if the holder think fit, be noted for non-acceptance or non-payment, but it is *not necessary to note or protest* it in order to preserve recourse against the drawer or indorsers.

But where a *foreign* bill has been dishonoured by non-acceptance or non-payment it *must be noted and protested*, otherwise the *drawer and indorsers* are discharged [s. 51 (1) (2)] (z).

Noting and protesting constitute formal evidence of dishonour. When the bill is dishonoured, the holder sends it to a notary public in order that he may make a notarial presentment. The bill, being so presented and again dishonoured, is *noted*, i.e., the notary makes upon it a memorandum consisting of his initials, the date, the noting charges, and a reference to his register. He also attaches to the bill a slip on which is written the answer obtained upon presentment, e.g., “No effects”, or “Payment countermanded”. His register contains a copy of the bill and of the answer obtained. The *protest* is a formal certificate of dishonour subsequently drawn up by the notary, containing a copy of the bill and specifying at whose request it was protested, the place and date of protest, the reason for protest, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found (a). The bill may be noted on the day of dishonour, and *must* be noted not later than the next business day (b), but the formal protest may be drawn up later and antedated as of the date of noting (c). Noting and protesting is dispensed with, and delay is excused upon the same grounds as notice of dishonour (d). If the services of a notary cannot be obtained,

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(z) S. 51 (1) (2). Noting is also necessary before a bill can be accepted for honour (s. 65 (1), *post*, p. 764)

(a) S. 51 (7).

(b) S. 51 (4), as amended by s. 1 of the Bills of Exchange (Time of Noting) Act, 1917.

(c) S. 98.

(d) S. 51 (9).

householder or substantial resident may, in the presence of witnesses, give a certificate, signed by them, attesting the honour of the bill, and having the same effect as a formal test (c).

Where the acceptor of a bill becomes bankrupt or insolvent, suspends payment before it matures, the holder may cause bill to be protested for better security against the drawer and indorsers (f).

**Duties of the holder as regards the drawee or acceptor.**—When a bill is accepted generally presentment for payment is necessary to render the acceptor liable.—When by the terms a *qualified* acceptance, presentment for payment is required, acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.—In order to render the acceptor of a bill liable it is not necessary to protest it or that notice of dishonour should be given to him” [s. 52 (1) (2) (3)]. A bill must be exhibited on presentation for payment and delivered up upon payment [s. 52 (4)] (g).

#### SUB-SECTION 6.—*Liabilities of Parties*

“A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee who does not accept as required by this Act is not liable on the instrument” [s. 53 (1)].

“The acceptor of a bill, by accepting it—

“(1) Engages that he will pay it according to the tenor of his acceptance [s. 54 (1)];

As to qualified acceptances, see s. 19, *ante*, p. 738.

“(2) Is precluded (or estopped) from denying to a holder in due course :

“(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

“(b) In the case of a bill payable to drawer’s order, the then capacity of the drawer to indorse, but *not* the genuineness or validity of his indorsement;

(c) S. 94.

(f) S. 51 (5)

(g) See *Auchteron & Co. v. Midland Bank*, [1928] 2 K. B. 204; 97 L. J. B 625.

“(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but *not* the genuineness or validity of his indorsement” [s. 84 (2)].

• “The drawer of a bill, by drawing it—

“(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

“(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse” [s. 85 (1)].

“The indorser of a bill, by indorsing it—

“(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

“(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

“(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto” [s. 55 (2)].

As has been already stated, the acceptor is the person primarily liable on the bill; the drawer and indorsers stand in the position of sureties, and are jointly and severally liable to the holder, who may sue all or any of them. As regards the holder, each indorser is in the position of a new drawer, and could not, therefore, for example, set up against him as a defence a forgery on the bill before his own indorsement.

As between themselves, each indorser is bound to indemnify subsequent indorsers, though the whole circumstances attendant upon the making, issue, and transference of a bill or note may be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or indorsers.

Thus, in *Macdonald v. Whitfield* (h), three directors of a company agreed to become sureties for a debt of the company, and for that purpose successively indorsed a promissory note of the company. It was held that evidence of the circumstances under which they signed was admissible, and that, in the circumstances, they were not liable to indemnify each other successively in the order of their indorsements, but that they were in the position of co-sureties, and were entitled and liable to equal contribution *inter se*.

“Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course” [s. 56].

An indorsement in the strict sense can be made only by a holder, but if a person who is not the holder of a bill signs it with the intention of making himself responsible for payment he is liable to a holder in due course as if he were in the strict sense an indorser (i).

But this liability is incurred only to a holder in due course. Thus, in *Jenkins & Sons v. Coomber* (k), a bill was drawn to the order of the plaintiffs and, before they indorsed it, the defendant wrote his name on the back. Held, that the defendant was not liable as indorser since the bill was not complete and regular on the face of it when the defendant indorsed it and therefore the plaintiffs were not holders in due course (l).

**Measure of damages.**—“Where a bill is dishonoured, the measure of damages, which shall be deemed liquidated damages, shall be as follows:—

“The holder can recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser—

“(a) The amount of the bill:

“(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

“(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest” [s. 57 (1)] (m).

(h) 8 App. Cas., at p. 745; 52 L. J. C. P. 70.

(i) See *Steele v. McKinlay*, 5 App. Cas., at p. 782; *Jenkins & Sons v. Coomber*, 1895] 2 Q. B., at p. 171; 67 L. J. Q. B. 780.

(k) *Id.* *supra*.

(l) Compare, however, *Macdonald v. Nash & Co.*, [1924] A. C. 625; 93 L. J. K. B. 610.

(m) Where a bill has been dishonoured abroad the amount of re-exchange may in general be recovered in lieu of the above damages: s. 57 (2).

Note that this section deals only with interest recoverable as *damages*, not interest reserved by the bill, as to which see s. 9, *ante*, p. 734. By s. 57 (2) the Court may, if justice require it, withhold either wholly or in part, the interest recoverable under the section as damages, *e.g.*, where there has been an excusable failure to pay. The Court refused to allow interest to be recovered as damages in a case when the bill had not been paid because the person in England liable on the bill was prohibited from paying the Dutch holder under the provisions of the Trading with the Enemy Act, 1939 (n).

**Transferor by delivery.**—Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery”. He is not liable on the instrument, but he “warrants” to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless [s. 58].

#### SUB-SECTION 7.—*Discharge of Bill*

A bill is discharged when *all* rights of action on it, by or against any party, are extinguished.

The discharge of a bill must be distinguished from the discharge of a *party* to a bill. One party may be discharged while as regards the rest the bill remains valid as, *e.g.*, where one indorser is discharged through not receiving notice of dishonour.

A bill is discharged in the following ways:—

1. By payment in due course by or on behalf of the drawee or acceptor. Payment in due course means “payment made at or after maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective” [s. 59 (1)] (o).

Except in the case of an accommodation bill, payment by the *drawer* or an *indorser* does not discharge the bill, but

- (a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment against the acceptor, but may not re-issue the bill;
- (b) where a bill is paid by an indorser, or where a bill payable to drawer’s order is paid by the drawer, the party paying is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike

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(n) *N. V. Ledeboter and Van der Held’s Textielhandel v. Hibbert*, [1947] K. B. 964.

(o) As to “good faith”, see *ante*, p. 724, see also *Auchteroni & Co. v. Midland Bank*, [1928] 2 K. B. 294; 97 L. J. K. B. 625.

out his own and subsequent indorsements and again negotiate the bill [s. 59 (2)].

2. In case of an *accommodation bill*, by payment in due course by the party accommodated [s. 59 (3)].

3. In case of a *cheque* by payment by the banker on whom it is drawn in good faith and in the ordinary course of business [s. 60] (p)

4. By the acceptor being or becoming the holder of it at or after its maturity, in his own right [s. 61] (q).

5. Where the holder of the bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor. Such renunciation must be in writing, unless the bill is delivered up to the acceptor [s. 62 (1)].

The liabilities of any *party* to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section affects the rights of a holder in due course without notice of the renunciation [s. 62 (2)].

Renunciation must be absolute and unconditional; a mere expression of intent to renounce is insufficient (r).

6. By an intentional cancellation of the bill by the holder or his agent, provided that the cancellation is apparent thereon. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but the burden of proof lies on the party alleging that it was so made [s. 63 (1) (3)].

In like manner any *party* liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such a case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged [s. 64 (2)].

7. By a material alteration of the bill or the acceptance made without the assent of all parties liable on the bill, *except* as against a party who has himself made, authorised, or assented to the alteration and subsequent indorsers. But, where a bill has been materially altered, but the alteration is not apparent, a holder in due course may enforce payment on it according to its original tenor.

In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time or place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent [s. 64 (1) (2)].

(m) See s. 59, p. 772.

(q) See *N. v. L. v. De Preville*, [1900] 2 Q. B. 72; 69 L. J. Q. B. 484.

(r) *Re C. v. D. v. Bruce* 41 Ch. D. 627; 69 L. J. Ch. 709.

Any alteration other than those specified in the section is also material if it would alter the business effect of the bill (s) or the rights and liabilities of the parties, as for instance an alteration of the place where the bill is drawn, so that it is changed from an inland bill into a foreign bill (t).

- An alteration is apparent if it is of such a kind that it would be noticed by a person who scrutinised the bill with reasonable care (u).

The section does not apply to a change due to a pure accident, as, e.g., defacement by fire (w).

The acceptor of a bill of exchange is under no duty to take precautions against fraudulent alterations in the bill after acceptance. Thus, in *Scholfield v. Londesborough*, the defendant accepted a bill for £500; the bill was stamped to cover a larger amount, and spaces were left so that it was possible to insert further words and figures. The drawer filled up these spaces, altered the amount to £3,500 and indorsed the bill to a holder in due course. It was held that the defendant owed no duty to every possible holder to take precautions against fraud, that he was not, therefore, estopped from denying his liability for £3,500, and was only liable for £500 (x).

The difference must, however, be noted between this case and a case where a person hands a blank signed bill or cheque to an agent with authority to fill it up (s. 20, *ante*, pp. 739-740), and also the liability of a customer to his banker (*post*, p. 767).

#### SUB-SECTION 8.—*Acceptance and Payment for Honour*

“When a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person not being a party liable thereon, may, with the consent of the holder, accept the bill *supra protest* for the honour of any party thereon, or for the honour of the person for whose account it is drawn” [s. 65 (1)] (y).

The acceptor for honour, by accepting, engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided that it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. He is liable to the

(s) See *Suffell v. Bank of England*, 9 Q. B. D., at p. 568; 51 L. J. Q. B. 401.

(t) *Koch v. Dicks*, [1938] 1 K. B. 307; 102 L. J. K. B. 97.

(u) *Woollatt v. Stanley*, 188 L. T. 620.

(w) *Hong Kong, etc., Bank v. Lo Lee Shi*, [1928] A. C. 181; 97 L. J. P. C. 85.

(x) [1896] A. C. 514; 65 L. J. Q. B. 598. See also *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559; 75 L. J. P. C. 76; *Bank of Montreal v. Exhbit, etc., Co.*, 22 T. L. R. 722.

(y) It must indicate that it is an acceptance for honour. It may be for part only of the sum for which the bill is drawn (*id.*, sub-s. (2)).

holder and to all parties subsequent to the party for whose honour he has accepted [s. 66 (1) (2)] (z).

Again, when a bill has been protested for non-payment, any person may intervene and pay *supra protest* for the honour of any party liable thereon, or for the honour of the person for whose account it is drawn. Payment for honour *supra protest* must be attested by a notarial "act of honour" appended to the protest. Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for and succeeds to the rights and duties of the holder as regards the party for whose honour he pays and all parties liable to that party [s. 68].

#### SUB-SECTION 9.—*Lost Instruments*

"Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the *drawer* to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again. If the drawer, on request, refuses to give such duplicate bill, he may be compelled to do so" [s. 69].

Note that there is no power to obtain again either the *acceptance* or an indorsement.

Also, in any action or proceeding upon a bill, the Court or a Judge may order that the loss of the instrument shall not be set up, provided a satisfactory indemnity be given against the claims of any other person upon the bill [s. 70].

#### SUB-SECTION 10.—*Bills in a Set*

When bills have to be sent by post, they are sometimes executed in duplicate or triplicate, and posted separately in case of the possible loss of one part. The whole of the parts then constitute one bill, and payment of one part discharges the whole set. If, however, the drawee accepts more than one part he is liable to a holder in due course of each part accepted, as if it were a separate bill. And if the holder of a set indorses more than one part he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if each part was a separate bill [s. 71].

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(z) By s. 67 (1), where a dishonoured bill has been accepted for honour, or contains a reference in case of need (*ante*, p. 736), it *must* be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need.



SUB-SECTION 11.—*Conflict of Laws*

When a bill drawn in one country is negotiated, accepted, or payable in another, “the validity of the bill as regards *requisites in form* is determined by the law of the place of issue; and the validity, as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made”.

But “where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue”; and “where a bill issued out of the United Kingdom conforms, as regards requisites in form, to the law here, it may, for the purpose of enforcing payment thereof, be treated as valid as between all person who negotiate, hold, or become parties to it in the United Kingdom”.

The *interpretation* of the drawing, indorsement, or acceptance, is determined by the law of the place where made; but when an inland bill is indorsed in a foreign country, the indorsement as regards the payer is interpreted according to the law of the United Kingdom.

The *duties of the holder* with regard to presentment, protest, and notice of dishonour are determined by the law of the place where the act is done or the bill is dishonoured; and where the bill is drawn out of but payable in the United Kingdom, the amount of the bill, in the absence of express stipulation, is calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

Where a bill is drawn in one country and payable in another, the date when it is due is determined by the law of the place where it is payable [s. 72 (1-5)].

SECTION 2.—*Cheques*

*Definition*.—“A cheque is a bill of exchange drawn on a banker, payable on demand”. Except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque [s. 73].

The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques to the extent that the account is in credit (a) or to the extent that he has, for valuable

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(a) *Foley v. Hill*, 2 H. L. C. 28; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C., at p. 789; 88 L. J. K. B. 55.

consideration, agreed to allow the customer to overdraw (b), provided that, where the customer is drawing against funds recently paid in by him, sufficient time has elapsed to enable the banker to know the state of the account (c).

For the wrongful dishonour of a cheque the customer has a right of action and, although he has suffered no special damage, may recover substantial damages for the injury to his credit (d).

A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque (e), and, unless the banker is protected by statute or has been misled by the customer, he cannot debit the customer's account with a payment made in contravention of his mandate (f) as for example, if he pays under an indorsement which does not correspond with the mandate expressed on the cheque (g).

But, even though a banker has paid a cheque in contravention of express instructions he is entitled to the benefit of the payment if it discharged a legal liability of the customer.

Thus, in *Liggett, Ltd. v. Barclays Bank*, the bank, contrary to express instructions, paid cheques of its customer which were signed by only one director. The cheques were drawn in favour of trade creditors of the customer and the proceeds were applied in payment for goods supplied by them to the customer. *Held*, that although at Common Law the bank would not be entitled to debit the customer with the amounts of the cheques, yet, under the equitable doctrine that a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment, the bank was entitled to credit for all amounts paid in discharge of the debts of the customer (h).

The customer, on the other hand, is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled: if he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty.

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- (b) *Fleming v. Bank of New Zealand*, [1900] A. C. 577; 69 L. J. P. C. 120.  
 (c) *Marzetti v. Williams*, 1 B. & Ad. 415; 9 L. J. (o.s.) K. B. 42.  
 (d) *Rolin v. Steward*, 14 C. B. 595; 28 L. J. C. P. 148. But, apparently, if he is not a trader, he can recover, as a rule, only nominal damages: *Gibbons v. Westminster Bank*, [1939] 2 K. B. 882; 108 L. J. K. B. 841.  
 (e) *London Joint Stock Bank v. Macmillan & Arthur* (*ubi supra*).  
 (f) See *Bank of England v. Vagliano*, [1891] A. C. 107; 60 L. J. Q. B. 145.  
 (g) *Slingsby v. District Bank, Ltd.*, [1932] 1 K. B. 544; 101 L. J. K. B. 281.  
 (h) [1928] 1 K. B. 48; 97 L. J. K. B. 1. See also *Lloyds Bank v. Chartered Bank of India, etc.*, [1929] 1 K. B. 40; 97 L. J. K. B. 609.

Thus, in *London Joint Stock Bank v. Macmillan & Arthur* (i), a firm entrusted to a confidential clerk the duty of filling in their cheques for signature. The clerk presented for signature a cheque payable to the firm or bearer in which no sum was written in words and the figures 2 0. 0. were in the space intended for figures. After signature the clerk inserted the words "one hundred and twenty pounds", and wrote the figures 1 and 0 in front of and after the figure 2, sufficient space for this being left. It was held that the firm had been guilty of breach of duty, and that the bank was entitled to debit their account with £120.

But a customer is not guilty of a breach of duty merely because he leaves a space between the name of the payee and the words "or order" (k).

It is an implied term of the contract between a banker and his customer that the banker will not, either during the continuance of the relationship or after it has ceased, disclose to any third person the customer's account and transactions with the bank, or any information relating to the customer or his affairs which he has acquired in his character of banker, except (i) where disclosure is under compulsion of law, as, *e.g.*, under the provisions of the Bankers' Books Evidence Act, or (ii) where there is a duty to the public to disclose, or (iii) where the interests of the bank require disclosure, or (iv) where the disclosure is made by the express or implied authority of the customer, as, *e.g.*, where the customer authorises a reference to his banker (l).

The duty and authority of the banker to pay a cheque drawn on him by his customer are determined (i) by countermand of payment, or (ii) notice of the customer's death (m), (iii) by a receiving order being made against the customer, or (iv) by notice that the customer has committed an available act of bankruptcy (n), (v) by service of a garnishee order *nisi* which attaches all the customer's balance even though it exceeds the amount of the debt (o).

(i) *Ubi supra*; approving *Young v. Grote*, 4 Bing 253; 5 L. J. C. P. 165.

(k) *Slingsby v. District Bank, Ltd.* (*ubi supra*).

(l) *Tournier v. National Provincial, etc., Bank of England*, [1924] 1 K. B. 461; 98 L. J. K. B. 449.

(m) S. 75. A banker is not bound to act upon an unauthenticated telegram countermanding payment. His duty in such a case is not to pay at once, but to make inquiries: *Curtice v. London City and Midland Bank*, [1908] 1 K. B., at p. 301; 77 L. J. K. B. 341.

(n) Bankruptcy Act, 1914, ss 7, 45; Bankruptcy Act, 1926, s. 4.

(o) *Rogers v. Whiteley*, [1892] A. C. 118; 61 L. J. Q. B. 521. This principle applies even though the customer is a solicitor and the cheque is drawn on a client account: *Plunkett v. Barclays Bank, Ltd.*, [1936] 2 K. B. 107; 105 L. J. K. B. 879.

**Presentment for payment.**—A cheque must be presented for payment within a reasonable time of its issue.

Where a cheque is not presented within a reasonable time, and the drawer or person on whose account it is drawn had the right, at the time of such presentment as between him and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which he is a creditor of the banker to a larger amount than he would have been had such cheque been paid.

But the *holder* of the cheque is a creditor, in lieu of such drawer or person, to the extent of such discharge and entitled to recover the amount from him [s. 74 (1) (3)].

Thus, A draws on his banker a cheque for £50, which is not presented for payment within a reasonable time. Before presentment the banker fails, A having sufficient money to his credit to meet the cheque. A is a creditor of the bank for £50 more than he would have been if the cheque had been paid. A is therefore discharged, and, as to that £50, B becomes a creditor in his stead.

In determining what is a reasonable time regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case [s. 74 (2)].

Before the Act it was held that if the banker was in the same place as the person receiving the cheque, it must be presented on the day after it is received, and, if he was in a different place, it must be forwarded for presentment on the day after it was received, and the agent to whom it is forwarded must present or forward it on the day after its receipt (p). This rule has, however, to some extent been modified by the modern usage of bankers, especially with regard to crossed cheques.

**Crossed cheques.**—The object of crossing a cheque is to prevent payment otherwise than through a bank.

A *general crossing* is constituted by the addition across the face of the cheque either (i) of the words “and company” or any abbreviation thereof between two parallel transverse lines, or (ii) of two parallel transverse lines simply.

A *special crossing* is constituted by the addition across the face of a cheque of the name of a banker (usually but not necessarily between parallel transverse lines). The words “*not negotiable*” may be added to either form of crossing [s. 76 (1) (2)].

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(p) *Alexander v. Burchfield*, 7 M. & Gr. 1061; 11 L. J. C. P. 258; *Heywood v. Pickering*, L. R. 9 Q. B. 428; 48 L. J. Q. B. 145.

"Where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had" [s. 81].

- That is to say, a crossed cheque bearing the words "not negotiable" is not a negotiable instrument (q).

Thus, in a case where a signed, blank cheque which was crossed and marked "not negotiable" was given by a member of a firm to his confidential secretary to fill up in the name of X for the sum of £2 and the secretary fraudulently filled it up in the name of Z, one of her own creditors, for the sum of £54 4s., it was held that as Z took the cheque from the secretary, who had no title to it, the firm was entitled under s. 81 to recover the £54 4s. from Z. Nor was s. 81 any less applicable because the person taking the cheque marked "not negotiable" was himself the payee named in the cheque. Furthermore, the question of the firm being estopped under s. 20 (2) (r) did not arise, firstly because the doctrine only arose where a person had acted to his detriment on the faith of the alleged representation and, secondly, because this document was not a negotiable instrument (s).

A cheque may be crossed generally or specially by the drawer.

If a cheque is uncrossed, the holder may cross it generally or specially.

If a cheque is crossed generally the holder may cross it specially.

If a cheque is crossed generally or specially, the holder may add the words "not negotiable".

If a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

If an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself [s. 77 (1-6)] (t).

A crossing is a material part of the cheque and no person may

(q) In the case of a bill (other than a cheque) the crossing "not negotiable" renders it untransferable in accordance with s. 8 (1) (*ante*, p. 733), *Hibernian Bank v. Gysin and Hanson*, [1939] 1 K. B. 488; 108 L. J. K. B. 214.

(r) *Ante*, p. 740.

(s) *Wilson and Meeson v. Pickering*, [1946] K. B. 422; [1946] 1 All E. R. 394, C. A.

(t) By s. 95 the provisions of the Act as to crossed cheques apply to dividend warrants, and, by the Bills of Exchange Act (1882) Amendment Act, 1932, to bankers' drafts also.

obliterate it, or, except as authorised by the Act, add to or alter it [s. 78].

*Duty of bankers as to crossed cheques.*—"Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof" [s. 79 (1)].

"Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker or, if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the *true owner* of the cheque for any loss he may sustain owing to the cheque having been so paid" [s. 79 (2)].

Note that this section imposes on the banker a liability, not to his customer, but to the true owner of the cheque, to whom he would not otherwise be liable (u). Thus A receives from B a crossed cheque payable to his order and indorses it in blank, intending to pay it into his bank. It is stolen by C who, in spite of the crossing, obtains payment from B's bank, on which the cheque was drawn. A, who is the true owner of the cheque, can recover the amount of it from B's bank.

But where a cheque is presented for payment which does not appear to be crossed or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Act, the banker paying the cheque in good faith and without negligence will not be responsible or incur any liability nor can the payment be questioned by reason of the cheque having been crossed, or of the crossing having been added to or altered, and of payment having been made in contravention of the crossing [s. 79 (2)].

The additions and alterations referred to by this proviso are additions to and alterations in the crossing and not additions to and alterations in the body of the cheque, which may avoid it altogether under s. 64 (*ante*, p. 763) (v).

*Protection to bankers.—Cheques paid on forged indorsements.*—"When a bill payable to order on demand (*i.e.*, a cheque) is drawn on a banker and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under

(u) See *Charles v. Blackwell*, 2 C. P. D., at pp. 157, 158; 46 L. J. G. P. 368.

(v) See *Slingsby v. District Bank, Ltd.*, [1902] 1 K. B. 544; 101 L. J. K. B. 281.

the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority " [s. 60].

- Note that this section creates an exception to s. 24 (*ante*, p. 742). It does not protect a banker when the drawer's signature is forged, because, while a banker cannot be acquainted with the signatures of payees who may have to indorse cheques drawn upon him, he is or ought to make himself acquainted with the signatures of his own customers (*w*).

Nor does the section protect the banker if he pays a cheque which is void under s. 64 because it has been materially altered or if he pays a cheque otherwise than in the ordinary course of business, *e.g.*, if he pays a crossed cheque otherwise than through a banker or through the banker to whom it is crossed (*x*).

Where a banker pays a cheque upon a forged indorsement, the true owner of the cheque can recover the amount from the person to whom it is paid (*y*), and if the cheque was crossed and paid in contravention of the crossing he can also recover from the banker (*z*). And, if the drawer chooses to waive the banker's mistake, he can recover from the person to whom the money was paid (*a*).

*Payment of crossed cheques.*—"Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner " [s. 80] (*b*).

This section does not protect the banker where a cheque is void under s. 64 because of a material alteration (*c*).

There is negligence which deprives a banker of protection under the section when he pays under an irregular invalid indorsement (*d*).

*Protection to collecting banker.*—"Where a banker in good faith and without negligence receives payment for a customer

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(*w*) *Charles v. Blackwell* (*ubi supra*).

(*x*) *Smith v. Union Bank of London*, L.R. 10 Q. B., at p. 296. Affirmed, 1 Q. B. D. 31; 45 L. J. Q. B. 149.

(*y*) *Ogden v. Benas*, L. R. 9 C. P. 513; 43 L. J. C. P. 259.

(*z*) S. 79 (1), *supra*.

(*a*) *Bobbett v. Pinkett*, 1 Ex. D. 373; 45 L. J. Ex. 555.

(*b*) As to the position of a drawer before and after the cheque has come into the hands of the payee, see *Charles v. Blackwell* (*ubi supra*).

(*c*) *Slingsby v. District Bank, Ltd.* (*ubi supra*).

(*d*) *Ibid.*

of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the *true owner* of the cheque by reason only of having received such payment" [s. 82].

To give a banker protection under this section the cheque must be crossed when he receives it, he gains no protection by crossing it himself (e).

The mere fact that the customer's account is overdrawn, so that the banker, by collecting the cheque, receives payment of the overdraft, does not deprive him of the protection given by this section (f).

There must be some sort of an account to make a man a customer of a banker; it is not sufficient that he has been in the habit of getting cheques cashed at the bank (g). But it is sufficient if the account was opened on the day before paying in the cheque (h).

One bank may be a "customer" of another bank, and where one bank regularly employs another bank as its agent for collection it is a customer of that bank (i).

Under this section it was held that a banker gained no protection if he placed the amount of a cheque to the customer's credit before it was collected, but by the *Bills of Exchange (Crossed Cheques) Act*, 1906, it is provided that "a banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the *Bills of Exchange Act*, 1882, notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof".

By receiving payment for a customer of a cheque to which that customer had no title the collecting banker is guilty of a conversion (k) and, apart from the protection afforded by s. 82,

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(e) *London City and Midland Bank v. Gordon*, [1908] A. C. 240; 72 L. J. K. B. 451.

(f) *Clarke v. London and County Banking Co.*, [1897] 1 Q. B. 552; 66 L. J. Q. B. 915.

(g) *Great Western Ry. v. London and County Banking Co.*, [1901] A. C., at p. 421; 70 L. J. K. B. 918.

(h) *Taxation Commissioners v. English, etc., Bank*, [1920] A. C. 683; 89 L. J. P. C. 181.

(i) *Importers Co. v. Westminster Bank, Ltd.*, [1927] 2 K. B. 297; 96 L. J. K. B. 919.

(k) "Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. As no specific coins in a bank are the property of any specific customer there might appear to be some difficulty in holding that a bank, which paid part of what it owed its customer to some other person not authorised to receive it, had converted its customer's chattels; but a series of decisions . . . have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it": *Lloyds Bank v. Chartered Bank of India, etc.*, [1929] 2 K. B., at p. 55; 97 L. J. K. B. 609; see also *Morison v. London County and Westminster Bank*, [1914] 3 K. B., at p. 878.



would have no defence. Accordingly it is for him to show that he is entitled to the defence given to him by this section and to disprove negligence (l).

Whether or not he was guilty of negligence is in each case a question of fact and must be considered in view of all the circumstances presented antecedent, and, when a series of cheques has been collected, in regard to each cheque separately (m).

Negligence may be constituted by the failure of the banker to make inquiries in circumstances which should put him upon his guard. And a banker is put upon his guard whenever a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it, as, for instance—

- (i) where a private customer pays into his own account a crossed cheque payable to and indorsed by a public official (n);
- (ii) where a customer who is known to be an agent pays into his own account a crossed cheque payable to and indorsed by his principal (o); “such a case carries even a clearer warning if the cheque is indorsed *per pro.* the employer or principal by the servant or agent” (p);
- (iii) where a customer known to be a servant pays into his own account a crossed cheque drawn by his employer in favour of a third person (q);
- (iv) where a customer pays into his own account a cheque drawn by him upon the banking account of a third person and expressed upon its face to be drawn by him as attorney for that person (r).

A banker may also be guilty of negligence if, in opening an account with a new customer, he fails to make reasonable inquiries as to his standing and circumstances, as, for instance, if, knowing that the new customer is a stockbroker's clerk or in similar employment, the banker does not ascertain the name of his employer. And if the customer is of old standing, but the banker has frequently had occasion to dishonour his cheques, thus showing a bad financial position, the banker must inquire more

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(l) *Lloyds Bank v. Savory & Co.*, [1938] A. C. 201, at p. 229; 102 L. J. K. B. 224.

(m) [1938] A. C., at pp. 230, 231.

(n) *Ross v. London County, etc., Bank*, [1919] 1 K. B. 678; 88 L. J. K. B. 927.

(o) *Underwood v. Bank of Liverpool and Martin's*, [1924] 1 K. B. 775; 93 L. J. K. B. 690; *Lloyds Bank v. Chartered Bank of India (ubi supra)*.

(p) *Lloyds Bank v. Savory & Co.*, [1938] A. C., at p. 229.

(q) [1938] A. C., at p. 230.

(r) *Midland Bank v. Reckitt*, [1938] A. C. 1; 102 L. J. K. B. 297.

carefully than would otherwise be necessary into the customer's right to a cheque not made payable to him (s).

And a banker may be guilty of negligence if his system is one which facilitates fraud.

Thus, in *Lloyds Bank v. Savory & Co.*, the respondents were stockbrokers who were in the habit of drawing cheques in favour of jobbers, made payable to bearer and crossed.

The respondents had two clerks, P. and S. P. had an account at the Wallington branch of the appellants' bank. The wife of S. had an account first at their Redhill branch and later at their Weybridge branch.

The bank officials at Wallington knew that P. was a stockbroker's clerk, but had not inquired who was his employer. No question had ever been asked of Mrs. S. as to her circumstances or the occupation of her husband.

P. stole cheques which he paid in at a City branch, making out paying slips in the name of the payees and directing payment to be made to the credit of his account at Wallington. S. stole cheques and adopted a similar procedure except that he directed payment to be made to the credit of his wife's account.

The stockbrokers sued for conversion of the cheques and the bank pleaded s. 82 of the Act.

*Held*, (i) that the managers of the crediting branches of the bank had failed to make sufficient inquiries when accepting P. and the wife of S. as customers; (ii) that the system of the bank was defective in that the branch which received the cheques did not inform the crediting branch of the name of the drawers, with the result that there was a division of knowledge which prevented the detection of frauds since the crediting bank only knew the customer and not the drawers of the cheques while the crediting bank knew only the drawer and not the customer; (iii) that the bank had therefore not disproved negligence and had not the protection of s. 82.

In the *Carpenters Company v. British Mutual Banking Co. (t)*, both the plaintiff company and their clerk banked at the defendant bank. Cheques payable to tradesmen of the plaintiff company were handed to the clerk, who forged the names of the tradesmen on the cheques, and paid the cheques into his own account. The defendant bank debited the plaintiff company's account, and credited the clerk's account, with the amount of the cheques. The clerk then emptied his account. The Court found that the defendant bank was negligent in regarding the clerk as entitled to the cheques and, therefore, as *collecting banker*, it was unable to claim the benefit of s. 82 of the Act. The defendant bank, however, pleaded that as *paying banker* it could claim the protection of s. 60 (u). It was held that the defendant bank could not escape liability as the collecting banker merely because it happened to be the paying banker also, and that it was, therefore, liable to the plaintiff company.

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(s) *Motor Traders Guarantee Corporation v. Midland Bank*, 157 L. T. 498.

(t) [1938] 1 K. B. 511; 107 L. J. K. B. 11.

(u) *Ante*. p. 772.

SECTION 3.—*Promissory Notes*

*Definition and form.*—"A promissory note is an unconditional (α) promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer" [s. 83 (1)].

"A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note" [s. 83 (4)].

"A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer" [s. 84].

"A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor. Where a note runs 'I promise to pay', and is signed by two or more persons, it is deemed to be their joint and several note" [s. 85 (1) (2)].

*Presentment for payment.*—"Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged."

"Where a note payable on demand has been negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that a reasonable time for presenting it for payment has elapsed since its issue" [s. 86 (1) (3)] (y).

Presentment for payment is not necessary in order to render the maker liable unless the note is in the body of it made payable at a particular place, but it is always necessary in order to render an indorser liable [s. 87 (1) (2)].

The words "in the body of the note" mean in the terms of the actual contract to pay which is contained in the note (z).

"Where a note is on the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice" [s. 87 (3)].

(α) A promise is not unconditional if the promise contained in the alleged promissory note refers to another document which contains conditions affecting the promise: *Wirth v. Weigel, Leygonie & Co.* (1939), 161 L. T. 248.

(y) As to reasonable time, see *ante*, p. 752.

(z) *Re British Trade Corporation*, [1932] 2 Ch., at p. 9; 101 L. J. Ch 273.

**Liability of maker.**—The maker of a promissory note, by making it—

1. “Engages that he will pay it according to its tenor;
2. Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse”  
[s. 88].

**Provisions of the Act not applicable to notes.**—The following provisions as to bills do not apply to notes, namely, those relating to (i) presentment for acceptance; (ii) acceptance; (iii) acceptance *supra protest*; (iv) bills in a set; also, where a foreign note is dishonoured, protest is unnecessary. Otherwise, save as already noted in this section, the provisions of the Act relating to bills of exchange apply with the necessary modifications to promissory notes, the maker of a note being deemed to correspond with the acceptor of a bill, and the first indorser of a note with the drawer of an accepted bill payable to drawer's order [s. 89].

## PART IV

### ARBITRATION

#### SECTION 1. *Definition and Classification*

**Definition.**—Arbitration is a means of trying and determining legal disputes alternative, or supplementary, to that provided by the ordinary Courts. Originally regarded with disfavour by the ordinary Courts as a sort of rival jurisdiction (*a*), it acquired in time a recognised status (*b*) and has now established itself as an important and integral branch of our system of justice.

All persons who can enter into a binding contract may be parties to an arbitration. Hence, infants cannot do so and any submission by an infant to arbitrate is voidable; nor can a bankrupt refer to arbitration so as to bind his estate and one of several partners cannot, without express authority, bind the others by a submission though the partner submitting will be personally bound.

**Arbitration compared with action.**—The features which distinguish arbitration tribunals (*c*) from the ordinary Courts, or at any rate from the Superior Courts, may be stated as follows :—

- (i) The parties to an arbitration may select their own judge, called “arbitrator” (*d*). This is the feature which the ordinary person has in mind when he contrasts arbitration with action at law, but it is not invariably present. For example in “statutory arbitrations” (*e*), not only is there no alternative recourse to the ordinary Courts, but the parties have no choice as to the arbitrator.
- (ii) The hearing is *in camera*, although this cannot be said

(*a*) “There was no disguising the fact that, as formerly, the emoluments of the Judges depended, mainly or almost entirely, upon fees, and as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall and a great scramble in Westminster Hall for the division of the spoil”: Lord Campbell in *Scott v. Avery* (1856), 25 L. J. Ex. 308, at p. 313.

(*b*) See *Browne v. Meverell* (1561), 2 Dyer 216 b. The earliest statute dealing with arbitration appears to have been 9 Will. 3, c. 15.

(*c*) Called by Fletcher Moulton, L.J., “private tribunals” in *Doleman v. Ossett Corporation*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092.

(*d*) Arbitration “is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between them”: per Romilly, M.R., in *Collins v. Collins* (1858), 28 L. J. Ch. 184.

(*e*) See *post*, p. 780.

to be exclusive to arbitration, since much of the adjudication in the ordinary Courts is done "in chambers".

- (iii) The jurisdiction of an arbitrator ends with his award and its enforcement belongs to the ordinary Courts (f).
- (iv) An arbitration court is not a Court of Record (g) and the arbitrator has no power to commit for contempt.
- (v) Only differences where public policy does not preclude compromise (h) may be the subject of arbitration, that is to say, substantially only the ordinary civil disputes which arise, as a rule, from breach of contract or from tort. Felonies, obviously, are not arbitrable since they may not be compounded, nor are lesser offences where the public interest is involved, e.g., perjury (i), or non-repair of a highway (k). And divorce is exclusive to the Probate, Divorce and Admiralty Division of the High Court. But where the aggrieved party has the option of proceeding civilly or criminally he may consent to arbitration, e.g., in the case of common assault (l) or nuisance (m).
- (vi) The procedure of arbitration is less elaborate and precise than that of the ordinary Courts, although it follows broadly similar lines. But its tribunals administer the same law and apply the same rules of evidence as do the ordinary Courts; and as instruments for ascertaining the truth and dispensing justice they do not materially differ from such Courts.

**Classification.**—As already indicated, resort to arbitration is a matter of agreement between the parties to a dispute, and neither the party seeking redress nor the party refusing it can be compelled to submit to arbitration without his consent, but there are important exceptions to this rule. Certain statutes provide for the settlement by arbitration of differences arising under them, and *where a matter is already being litigated in the ordinary Courts*, the Judge dealing with it may in a proper case refer to arbitration the whole matter or some part of it.

(f) See *post*, p. 807.

(g) See *ante*, p. 82.

(h) *Keir v. Leeman* (1844), 6 Q. B. 308; 13 L. J. Q. B. 259; affirmed (1846) 3 Q. B. 371; 15 L. J. Q. B. 360.

(i) *R. v. Hardey* (1850), 14 Q. B. 529; 19 L. J. Q. B. 196.

(k) *R. v. Blakemore* (1850), 14 Q. B. 544.

(l) *Elworthy v. Bird* (1826), 2 Sim. & Stu. 372; 3 L. J. (o.s.) C. P. 260.

(m) *Dobson v. Groves* (1844), 6 Q. B. 637; 14 L. J. Q. B. 17.

References to arbitration may, therefore, be classified under three heads : (i) By consent out of Court ; (ii) Under Statutory Powers ; and (iii) Under Order of Court.

(i) *References by consent out of Court.*—It is this class of reference which bears the name of “arbitration” in popular acceptance and it is the one which this Part is almost entirely concerned. Many persons adopt it in appropriate cases, in preference to the ordinary Courts, because, the hearing being *in camera*, public disclosure of trade secrets or private affairs is thereby obviated, or because the arbitration tribunal may be selected for expert knowledge of the subject-matter, or because of the informal, almost “family party” atmosphere of the court. It is also sometimes thought to save expense, but when the fees of solicitors, counsel, arbitrator or arbitrators and possibly umpire are discharged, this benefit may prove illusory. Submissions out of Court are governed by the Arbitration Act, 1950, (hereinafter referred to as “the Act”), which consolidates the Arbitration Act, 1889, the Arbitration Clauses (Protocol) Act, 1924, the Arbitration (Foreign Awards) Act, 1930 and the Arbitration Act, 1984.

(ii) *References under Statutory Powers*, or, as they are called in the Act, “Statutory Arbitrations” may be instanced by the references provided for under the Lands Clauses (Consolidation) Act, 1845, and the Agricultural Holdings Act, 1948 (n). Cases under these statutes are almost invariably those where the claim is not for *damages* for breach of contract or for tort, but for *compensation* for loss sustained. For example, a railway may be empowered by statute to take for its own purposes land not already belonging to it. Being so empowered, the seizure is not illegal and the Common Law gives the owner no right to recover either his land or damages for the loss of it. But it is only right that he should be compensated for the deprivation, and the statute will provide accordingly, directing that the amount of compensation shall be determined by arbitration. By the effect of s. 81 (1) of the Act the provisions of the Act (with certain exceptions) apply to references under statutory powers except so far as such provisions are inconsistent with the provisions of the particular statute under which the reference takes place, in which case the latter provisions will prevail. In the case, therefore, of reference under any special Act, the terms of reference

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(n) For further examples, see Russell on Arbitration, 14th ed., pp. 16, 17; and Encyclopaedia of the Laws of England, 3rd ed., tit. Arbitration.

contained in it must be consulted, and applied so far as they may vary from those of the Act of 1950.

(iii) *References under Order of Court.*—By ss. 89–92 of the Judicature Act, 1925, the Court in any cause or matter may (except where there is a right to trial by jury) refer any question arising to an Official or Special Referee (o) *for inquiry or report* and may adopt such report wholly or in part. And, with the consent of the parties, or where the matter requires prolonged examination of documents or scientific or local examination which the Court considers cannot conveniently be made through its own ordinary officers, or where the matter in dispute consists wholly or in part of matters of account, the Court may order the whole matter or any issue of fact to be tried by a Special Referee or arbitrator agreed on by the parties or by an Official Referee or officer of the Court (p). References under Order of Court are subject to Rules of Court. They belong, therefore, to the topic of Supreme Court practice and do not fall within the scope of this work.

## SECTION 2.—*The Arbitration Agreement*

**Requisites of the arbitration agreement.**—Coming to the proper subject of this Part, *viz.*, references by consent out of Court, the consent is contained in an “arbitration agreement” which is defined as “a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not” (q). The definition calls for consideration in detail.

(i) *There must be an “agreement”.*—Inasmuch as a submission is an agreement, it is governed by the general rules relating to contract set out in Part I of this work. For example, if one party to an arbitration agreement has obtained the other party’s consent by fraud, the latter can repudiate the agreement upon discovering the fraud, provided that he acts promptly and before doing anything to ratify his consent (r). And an infant is not bound by his consent to an agreement unless, possibly, it can

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(o) An Official Referee is one of a number of officers of the Court appointed for the purposes of reference, whose work is allotted to them by rota. A Special Referee is anybody, other than an Official Referee, to whom the Court decides to refer the matter on account of some special qualification for dealing with such matter.

(p) *E.g.*, a Master.

(q) S. 32.

(r) And where the agreement to refer is impeached, the Court will grant an injunction to restrain proceeding in the arbitration pending decision as to whether the agreement was binding: *Jackson v. Barry Ry.*, [1898] 1 Ch. 286, at p. 246.



be shown that a reference to arbitration, as distinct from action in the Courts, is for his benefit (*s*). Where the subject-matter is illegal the agreement is void, *e.g.*, where the differences related to gaming and wagering transactions (*t*). And an arbitration agreement is void so far as it attempts to oust the jurisdiction of the Court, *e.g.*, where it provided that the arbitrator should not state a case for the opinion of the Court (*u*). It has, however, been held that the provision commonly inserted in policies of insurance to the effect that the insured shall not be entitled to bring an action on the policy until the amount payable to him under it has been ascertained under the arbitration clause, is not an ouster of the Court's jurisdiction (*x*), and that such a provision is a good defence to an action brought in breach of it (*y*). But these decisions have been greatly affected by what is now s. 25 (4) of the Act (the effect of which is set out later (*z*)) which, while leaving the decisions standing as enunciating a general principle, enables the Court in proper cases to go behind the provisions referred to where justice requires.

That an arbitration clause in a contract is assignable in its nature is clearly contemplated by s. 4 (1) of the Act (*a*) and such clause will follow the assignment of the subject-matter of the contract (*b*).

If there is no contract there can be no submission to arbitration, and if, there being properly no agreement, an arbitrator proceeds to make an award, the award is a nullity. But if the arbitrator makes an award before the question whether there was a contract has been determined, and it is subsequently found that there was a contract, the award is good (*c*).

(ii) *The agreement must be "written"*.—An oral arbitration agreement is valid at Common Law, but is not within the Act (*d*).

(*s*) See *Stephens v. Dudbrige Iron Works*, [1904] 2 K. B. 225, a case of election of remedies.

(*t*) *Joe Lee v. Lord Dalmeny and Others*, [1927] 1 Ch. 300; 96 L. J. Ch. 174.

(*u*) *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478; 92 L. J. K. B. 81.

(*x*) *Scott v. Avery* (1856), 5 H. L. C. 811; 25 L. J. Ex. 308.

(*y*) *Viney v. Bignold* (1887), 20 Q. B. D. 172; 57 L. J. Q. B. 82.

(*z*) See *post*, p. 811.

(*a*) *Aspell v. Seymour*, [1929] W. N. 152, decided upon s. 1 of the Act of 1889.

(*b*) *Shayler v. Woolf*, [1946] Ch. D. 320.

(*c*) *Golodetz v. Schrier* (1947), 80 Ll. L. Rep. 647.

(*d*) The disadvantages of an oral arbitration agreement are so many that the topic may be regarded as obsolete. For example, at Common Law (*whether the agreement is oral or in writing*) either party might revoke the arbitrator's authority at any time before the actual award, leaving the other party to claim such damages as he could substantiate for breach of the agreement to arbitrate (*Vignson's Case* (1610), 8 Co. Rep. 81 b), and, in the case of a parol agreement, even if an award was obtained, it could only be enforced by an action brought

the agreement is usually signed by the parties or by their agents authorised in that behalf, but it will be seen that the definition does not in its terms necessitate this. No doubt the agreement must be signed by the party against whom it is invoked if it is to enforce a contract upon which no action could be brought owing to the absence of a note or memorandum signed by such party (e). And, on the other hand, if a person seeks to enforce an action a contract not signed by him which contains an arbitration clause the action will be stayed on the ground that he cannot both claim under and at the same time repudiate the contract (f). But apart from such cases the matter cannot be considered as determined (g), but it ought :—

- (a) to point out clearly the matters to be referred;
- (b) to express the agreement of the parties to submit such matters to a certain person called the arbitrator and their willingness to be bound by his decision;
- (c) to make parties to the agreement all persons who will be affected by the award;
- (d) to include all terms agreed upon;
- (e) to indicate clearly the powers and duties of the arbitrator;
- (f) to state any extraordinary powers required by the arbitrator to enable him to settle the matter in dispute;
- (g) to exclude expressly any provisions in the First Schedule of the Act of 1889 (h) if the parties so desire.

The parties may amend or alter the terms of the agreement at any time before the award has been made, but they must agree and be *ad idem* regarding the alteration. The alteration must be in writing or by deed if the agreement was by deed. But the arbitrator has no power to amend the terms though the Court

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in it (*Insell v. Evans* (1796), 7 T. R. 1), and it could not be made a Rule of Court. In addition, the terms of an oral agreement are frequently difficult to ascertain.

(e) Under s. 4 of the Statute of Frauds and s. 40 of the Law of Property Act, 1925; see *ante*, p. 58.

(f) *Baker v. Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q. B. 144; 61 J. Q. B. 838 (where an action by the assured upon a policy not signed by him and containing an arbitration clause, was stayed), and *Hickman v. Kent Romney Marsh Sheep Breeders' Association*, [1915] 1 Ch. 881; 84 L. J. Ch. 38 (where an action was stayed brought by a shareholder to enforce his rights under the articles of association of a company which contained a provision for the settlement by arbitration of any dispute under them).

(g) "The weight of authority . . . appears to support the view that the submission need not be signed by the party charged, unless the contract itself is one which the law requires to be so signed. But the point cannot be looked upon as finally settled": Russell, 14th ed., p. 249.

(h) *Post*, p. 786. This Schedule has now been divided into separate sections in the body of the Act.

has power to amend (but not to vary or add new matter) so as to give effect to the real intention of the parties (i).

The submission need not be in any particular form. It may be contained in several documents so long as they are connected by internal reference and show a concluded contract (j), the ordinary rules as to the sufficiency of the note or memorandum of a contract requiring to be so evidenced applying (k). The arbitration agreement must be stamped as an agreement (l) if it relates to matter of the value of £5 or upwards, or of uncertain value (m).

(iii) *The agreement must be to refer present or future "differences"*.—Differences may be submitted when they have actually arisen, or they may be provided for in advance in the event of their arising as, for example, by the "arbitration clause" to be found in many agreements. But they must be *differences* and a mere refusal or failure to discharge an undisputed liability is not a "difference" within the meaning of the definition (n). The differences need not be specifically stated or the nature of them indicated in any way in the arbitration agreement. For example, A alleges that he has been slandered by B, which B denies. The agreement may be for "a difference" between A and B. The arbitrator's first act is to ascertain the differences with precision if they are not so stated in the agreement.

(iv) *The agreement must be for "arbitration"*.—Arbitration is a *juridical* inquiry in which the parties present their respective cases to the arbitrator, adduce evidence, and submit arguments; and so far as questions of fact are concerned the arbitrator must act upon the evidence before him. There is no substantial difference between the method by which a Judge of the ordinary Courts and an arbitrator respectively arrive at their decisions. But if the parties agree to refer the matter to a third party who is to act upon his own knowledge and judgment, reinforced to such extent and in such manner as he may please, the agreement is not an arbitration agreement but a reference for valuation,

(i) *Vanderbyl v. McKenna*, L. R. 2 C. P. 52.

(j) *Lobitos Oilfields v. Admiralty Commissioners* (1917), 86 L. J. K. B. 1444. But if it is intended to incorporate an arbitration clause in an agreement by reference to the clause, the reference must be clear: *London Bag and Sack Co. v. Dizon & Lugton* (1944), 170 L. T. 70.

(k) See *ante*, p. 59.

(l) Stamp Act, 1891. 6d. if under hand, 10s. if under seal.

(m) *E.g.*, "all differences and matters in dispute".

(n) See *London and North Western Ry. v. Jones*, [1915] 2 K. B. 35; 84 L. J. K. B. 1268, and *London and North Western and Great Western Joint Ry. v. Billington*, [1899] A. C. 79; 68 L. J. Q. B. 162.

appraisement, assessment, or however the operation may be described. Such a reference has been termed "quasi-arbitration" and the referee a "quasi-arbitrator". The difference between the two methods of determination is important in the following respects.

- (a) Whereas an arbitrator must act judicially, the only obligation upon a quasi-arbitrator is to act in good faith (o) :
- (b) the award of a quasi-arbitrator can only be enforced by an action brought upon it and cannot be made enforceable as a judgment or order of the Court as is the case of an arbitrator's award (p) :
- (c) an arbitrator is not liable to an action for negligence if he acts in good faith, but a valuer is so liable :
- (d) an arbitrator's decision is called an *award*, a valuer's decision an *appraisement* :
- (e) an arbitrator is not the agent of either party : he acts in a quasi-judicial capacity in the dispute but a valuer is the agent of either or both of the parties :
- (f) the stamp duty is a uniform 10s. in an arbitration whereas an *ad valorem* stamp is necessary on a valuation as an appraisement.

Whether a reference is to arbitration or quasi-arbitration depends upon the intention of the parties, which may be difficult to ascertain where not expressed clearly. For instance, the use of the expression "for valuation" is not conclusive, and a reference in these words has nevertheless been held to be for arbitration (q). It is stated frequently that arbitration is intended to settle differences which have arisen, while valuation is intended to prevent differences from arising, but such a test is misleading, as reference may be made to a valuer *as valuer* to settle an existing dispute, e.g., where the parties are at variance as to the reasonable price of goods supplied or the proper charge for services rendered. The question is always as to which mode of arriving at a decision was *intended* by the parties, and such intention must be ascertained in each case from examination of the

(o) For example, if a valuer does not observe the mode prescribed in his reference for arriving at his valuation, unless bad faith on his part is proved his valuation is conclusive as between the parties, and he is not even liable for negligence for not carrying out his instructions: *Finnegan v. Allen*, [1948] K. B. 425; 112 L. J. K. B. 323.

(p) *Post*, p. 809.

(q) *Boynnton v. Richardsons*, [1924] W. N. 262: "You cannot make a valuer an arbitrator by calling him so, or *vice versa*": *per* Neville, J., in *Taylor v. Yelding* (1912), 56 S. J. 253; and see *Mills v. Bayley* (1863), 32 L. J. Ex. 179.

particular circumstances (r). Arbitration must also be distinguished from determination by governing bodies or persons in relation to the deprivation of membership or office, e.g., the Benchers of an Inn of Court in disbaring counsel, the Law Society in striking a solicitor off the Rolls, the committee of a club in the expulsion of members. In such matters the body becomes *quasi-judicial*, i.e., they must "act in good faith and fairly listen to both sides. But I do not think they are bound to treat such a question as though it were a trial" (s). "It is not required to conduct itself as a Court" (t). It may devise, or even improvise, its own procedure so long as such procedure is reasonable for its own purpose and no bias appears.

(v) *Agreement need not name an arbitrator.*—Not only need not the arbitration agreement designate an arbitrator—it need not even provide expressly for the appointment of one. When it does not do so, the omission is corrected by para. (a) of the provisions implied in a submission now to be referred to (u).

**Provisions implied in the arbitration agreement.**—S. 2 of the Act of 1889 provided that an arbitration agreement should be deemed to include a series of provisions (contained in the First Schedule to that Act and amended by the Act of 1934) so far as such provisions were applicable to the particular reference *and so far as a contrary intention was not expressed in the agreement*. Although each will be referred to later in its appropriate place, it seems desirable forthwith to set them out as a whole and to show their new positions in the Act of 1950. They were as follows:—

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator. [*See now Act of 1950, s. 6.*]

(b) If the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed. [*As amended by Act of 1934, see now Act of 1950, s. 8 (1).*]

(c) [*Repealed by Act of 1934.*]

(d) If the arbitrators have delivered to any party to the

(r) *Per Lord Esher, M.R., in Re Carus Wilson and Greene* (1886), 18 Q. B. D. 7, at p. 9; 56 L. J. Q. B. 530.

(s) *Per Lord Loreburn, L.C., in Board of Education v. Rice*, [1911] A. C. 179, at p. 182; 80 L. J. K. B. 796.

(t) *General Medical Council v. Spackman* (1948), 169 L. T. 226, H. L. It was held, however, that the council had wrongly excluded evidence for the defendant. See also *R. v. Archbishop of Canterbury* (1944), 170 L. T. 115.

(u) Since the differences need not be specified (see *ante*, p. 784), or the arbitrator named or designated, an agreement may be in very few words, e.g., "We the undersigned hereby submit our differences to arbitration" is a sufficient agreement.

arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators. [*As amended by Act of 1934 : see now Act of 1950, s. 8 (2).*]

(e) [*Repealed by Act of 1934.*]

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire, all documents within their possession or power respectively which may be required or called for, and do other things which during the proceedings on the reference the arbitrator or umpire may require. [*See now Act of 1950, s. 12 (1).*]

(g) The witnesses on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation. [*See now Act of 1950, s. 12 (2).*]

(h) The award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively. [*See now Act of 1950, s. 16.*]

(i) The costs of the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client. [*See now Act of 1950, s. 18 (1).*]

(j) The arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land. [*Added by Act of 1934, see now Act of 1950, s. 15.*]

(k) The arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part [I] of this Act to an award includes a reference to an interim award. [*Added by Act of 1934, see now Act of 1950, s. 14.*]

**An arbitration agreement is, as a rule, irrevocable.**—An arbitration agreement consists in effect of an agreement to refer and a mandate to the arbitrator to adjudicate upon the dispute. The agreement itself is, as with all agreements, irrevocable unless it otherwise provides or both parties agree to revoke it. But at Common Law the mandate was revocable by either party (a) and legislation was necessary to make it otherwise. This was

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(a) See *ante*, p. 782.

first enacted in 1833 (b), and s. 1 of the Act of 1889 (which repeals the corresponding provisions of the statute of 1833) provided that an agreement should be irrevocable and have the same effect as if made an Order of Court unless a contrary intention was expressed in it or the Court granted leave to revoke it. S. 1 of the Act now reads: The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or a judge thereof. This section is supplemented by s. 18 (2) which states: Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable in the High Court.

**Principal grounds of revocation.**—The principal grounds upon which the Court may grant leave (c) have been classified thus (d): (i) error of law or excess or refusal of jurisdiction by arbitrator; (ii) misconduct of arbitrator; (iii) disqualification of arbitrator; (iv) certain exceptional cases. But the powers given to the Court by the Act to remove an arbitrator and replace him by another, to set aside an award, to remit an award for reconsideration, or to order the arbitrator to state a case for the consideration of the Court, have largely outmoded the remedy by revocation, and this, combined with the reluctance of the Court to apply such a drastic remedy (e), appears to render unnecessary detailed consideration in this place of the grounds upon which it would be applied. The present position may be said to be that leave to revoke will not be given unless there is *both* risk of a substantial miscarriage of justice if the arbitration is allowed to proceed in accordance with the agreement *and* there is no way of avoiding such risk except by revocation of the submission itself (f). Two grounds of revocation have, however, been expressly dealt with by the Act, *viz.*, (i) possible bias in the arbitrator, *e.g.*, where litigation was taking place between the arbitrator and one of the parties (g) or where

(b) 3 & 4 Will 4, c. 42.

(c) Revocation must be distinguished from *avoidance* or *nullity* of the arbitration agreement, as to which see *ante*, p. 781.

(d) By Russell, 14th ed., p. 46.

(e) "I feel there is the strongest possible objection to it in any case which does not imperatively call for it". Stephen, J., in *James v. James* (1889), 22 Ch D 669. "A very strong case [for leave to revoke] should be made out": Tindal, C.J., in *James v. Attwood* (1889), 7 Scott 843. "An application for leave to revoke a submission is one to be granted with great caution": Mathew, L.J., in *Belcher v. Roedean, etc.* (1901), 85 L. T. 468.

(f) See *James v. James* (1889), 22 Q. B. D. 669; 58 L. J. Q. B. 300, and *Steamship Den of Ashie Co. v. Mitsui & Co.* (1912), 106 L. T. 451.

(g) *Re Baring Bros. and Doulton & Co.* (1892), 61 L. J. Q. B. 704.

an insurance company appointed its own manager as arbitrator (h), and (ii) where fraud is alleged against one of the parties.

(i) *Bias of arbitrator*.—S. 24 (1) of the Act provides that where there is an agreement to submit future disputes to a named or designated arbitrator (i) and revocation is applied for on the ground that such arbitrator may not prove impartial, the Court cannot refuse revocation or an injunction to restrain the other party or the arbitrator from proceeding with the arbitration merely because the party applying knew or should have known at the time of entering into the agreement that such arbitrator might not be capable of impartiality by reason of his relation towards any other party to the agreement or of his connection with the subject-matter referred. It will be observed that this provision applies only to a submission relating to future disputes, and the rule remains that if, in respect of disputes which have actually arisen, a party agrees to the appointment of an arbitrator whom he knows, or should know, may not prove impartial he cannot afterwards come into Court and complain of such appointment.

(ii) *Fraud of party*.—S. 24 (2) provides that where there is an agreement to refer future disputes and a dispute arises involving the question of whether one of the parties has been guilty of fraud, the Court is empowered to order that the agreement shall cease to have effect so far as necessary to enable such question to be determined by the Court itself (i.e., to order partial revocation), and even to give leave to revoke the agreement entirely. It will be seen that this, like the previous provision, applies only to agreements relating to future disputes, and was aimed at the provision (common, for example, in insurance policies) by which the obtaining of the award of an arbitrator was made a condition precedent to a party's right to bring an action to enforce the contract, and which was held (k) to bar such action even though a charge of fraud was involved in the dispute. The sub-section empowers the Court to break through such a provision as that referred to so as to enable the party against whom the fraud is alleged to have the allegation ventilated in open Court.

**Death of party.**—The Act also deals with a case of what might be termed automatic revocation. Previously, the death of a

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(h) *Re Frankenberg and Security Co.* (1894), 10 T. L. R. 393.

(i) *E.g.*, in the case of an arbitration clause in a contract, which specifically names or designates the arbitrator.

(k) *E.g.*, in *Foster v. Hastings Corporation* (1908), 87 L. T. 786.



party operated as a discharge of the agreement to submit and revocation of the authority of the arbitrator, but s. 2 provides that the arbitrator may proceed at the instance of, or against, the personal representatives of the deceased (*l*), except where the right of action is itself extinguished by death (*m*).

**Bankruptcy of party.**—Bankruptcy of a party to an arbitration agreement does not operate as a revocation of the agreement, but may possibly afford ground to the other party for an application to the Court for revocation (*n*). The trustee in the bankruptcy, however is not bound by the agreement, except where (as provided by s. 3 (*o*) of the Act) a contract to which the bankrupt was a party contains a provision for arbitration of differences arising under the contract, and the trustee adopts the contract (*p*), in which event the provision for arbitration becomes enforceable by or against him. And by the same section (*q*) where the trustee does not adopt the contract but any matter to which the provision for arbitration applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, any party (other than the bankrupt) or (with consent of the committee of inspection) the trustee, may apply to the Court (*r*) for an order directing that such matter be referred to arbitration, and the Court may, if it thinks proper in the circumstances, direct arbitration accordingly.

**How an arbitration agreement is enforced.**—The Court will not decree specific performance of an agreement (*s*) and the primary remedy afforded to a party where the other party refuses to proceed with the agreement is an action for damages for breach of the agreement. Such damages are, however, as a rule merely nominal except, as is sometimes the case, where the agreement is reinforced by a bond entered into by the parties fixing a substantial sum as liquidated damages in the event of breach.

**Stay of proceedings.**—Specific performance may, in effect, be obtained indirectly by the Court staying proceedings in any

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(*l*) Sub-s. (1).

(*m*) Sub-s. (3), *e.g.*, in libel and slander and torts generally For rule and statutory exceptions, see *ante*, pp. 280, 281

(*n*) See Russell, 14th ed., p. 365, and the cases there cited.

(*o*) Sub-s. (1)

(*p*) In accordance with s. 54 (4) of the Bankruptcy Act, 1914

(*q*) Sub s. (2).

(*r*) *I.e.*, the Court having jurisdiction in bankruptcy.

(*s*) *South Wales Ry. v. Wythes* (1854), 5 De G. M. & G. 880; 24 L. J. Ch.

action brought by the recalcitrant party and so leaving him without remedy except under the agreement (i). The application to stay proceedings in Court brought by a party in breach of a submission is made under s. 4 of the Act of 1889 which lays down the conditions under which a stay will be granted. These are (i) the application must be made after the applicant has entered appearance in the action and (ii) *before delivering any pleadings* or "taking any other steps" in the proceedings, (iii) the Court must be satisfied that there is no "sufficient reason" why the matter should not proceed in accordance with the submission, and (iv) that the applicant at the time the proceedings were commenced was ready and willing to do everything necessary for the proper conduct of the arbitration and remains willing and ready. "Other steps in the proceedings" refers to something done in Court, not to something done between the parties out of Court, e.g., obtaining order for extension of time for delivery of defence is a step in the proceedings (u), whereas obtaining such an extension from the plaintiff without application to the Court is not such a step (a). Further instances of "steps in the proceedings" are application by defendant that plaintiff give security for costs (b) and filing by defendant of affidavit disputing the claim in reply to plaintiff's application for judgment under R. S. C., Order 14, even though the affidavit asserts the defendant's right to arbitration (c), or obtaining an order for the delivery of interrogatories (d). Responding to an application merely auxiliary to the main proceedings is not a step in the proceedings, e.g., filing affidavits by defendant in answer to plaintiff's application for appointment of a receiver (e), or demanding a statement of claim at the time of entering appearance (f), giving notice on a default summons in the county court of intention to defend (g) or agreeing to an amendment of a slip

(t) "The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but, if duly appealed to, it has the power in its discretion to refuse a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration" *per* Fletcher Moulton, L.J., in *Doleman v Ossett Corporation*, [1912] 3 K. B. 257, at p. 269; 81 L. J. K. B. 1092.

(u) *Ford's Hotel Co v. Bartlett*, [1896] A. C. 1; 65 L. J. Q. B. 166.

(a) *Brighton Marine Palace v. Woodhouse*, [1898] 2 Ch. 486; 62 L. J. Ch 697

(b) *Adams v. Catley* (1892), 66 L. T. 687.

(c) *Carbide Trading Co. v. Chas. Bringham & Co.*, decided by Ridley, J., in Chambers on April 15, 1915, and unreported.

(d) *Chappell v. North*, [1891] 2 Q. B. 252.

(e) *Zalunoff v. Hammond*, [1898] 2 Ch. 92; 67 L. J. Ch. 370

(f) *Ives and Barker v. Willans*, [1894] 2 Ch. 478.

(g) *Austin and Whiteley v. Bowley* (1918), 108 L. T. 921.

in a summons to which defendants had put in appearance under protest (*h*). The Court may grant the auxiliary relief and at the same time stay the action so as to compel the applicant to resort to arbitration upon the main issue in accordance with the arbitration agreement (*i*).

**Grant or refusal of stay.**—It is not possible to classify with precision the reasons which the Court will regard as “sufficient” for refusing to stay the proceedings in Court and so, in effect, depriving the applicant for the stay of the benefit of the submission. The Court has refused a stay where an important constitutional question was involved (*k*), where the difference was principally one of law or the construction of an agreement (*l*), and where the disputes within the agreement were not conveniently severable from disputes not within it (*m*).

On the other hand, the Court has granted a stay notwithstanding that it appeared that the arbitrator’s powers were insufficient to afford a complete remedy (*n*), or that the arbitration would involve undue expense (*o*), or that the reference was to a foreign tribunal (*p*), or that the applicant for the stay had repudiated a contract which contained an arbitration clause (*q*).

(*h*) *Metropolitan Tunnel, etc., Ltd. v. London Electric Ry.*, [1926] 1 Ch. 371.

(*i*) *Compagnie du Sénégal v. Woods & Co.* (1883), 53 L. J. Ch. 166.

(*k*) *Anglo-Newfoundland Development Co. v. R.*, [1920] 2 K. B. 214; 80 L. J. K. B. 571.

(*l*) *Bristol Corporation v. John Aird & Co.*, [1918] A. C. 241; 82 L. J. K. B. 684: “Everybody knows that with respect to the construction of an agreement it is absolutely useless to stay an action, because it will only come back on a case stated; therefore it is more convenient . . . to allow the action to proceed”: per Lord Parker, [1918] A. C., at p. 261. But it must not be taken for granted that the Court will refuse a stay in such a case. In *Heyman v. Darwins*, [1942] A. C. 356; 111 L. J. K. B. 241, Lord Wright regarded Lord Parker’s dictum as too wide and pointed out that “under a general submission, the arbitrator is appointed to decide issues both of fact and law”.

(*m*) *Turnock v. Sartoris* (1889), 43 Ch. D. 150.

(*n*) *Willesford v. Watson* (1878), L. R. 8 Ch. 478; 42 L. J. Ch. 447, where the plea was that an injunction was necessary for a complete remedy and that an arbitrator had no power to grant it; and *Wade-Gery v. Morrison* (1877), 37 L. T. 270, where it was pleaded that an arbitrator could not grant ejectment. In both cases the Court said that it could itself supplement the award where it was remedially deficient.

(*o*) *Denton v. Legge* (1895), 72 L. T. 626.

(*p*) *Kirchner v. Gruban*, [1909] 1 Ch. 418; 78 L. J. Ch. 117.

(*q*) *Heyman v. Darwins*, [1942] A. C. 356; 111 L. J. K. B. 241, where it was held that repudiation of such a contract did not necessarily imply repudiation of the arbitration clause, since such a clause was not one of the purposes of the contract, and it would survive for the purpose of settling claims arising out of the repudiation. But the position may be different if the party seeking the stay has repudiated on the ground that he had, in effect, never entered into the contract at all, as in such case he is denying that he had ever entered into the arbitration clause, and therefore cannot afterwards claim the benefit of it; or where such party has repudiated on the ground that the contract was void

Thus a deviation or repudiation by a carrier or warehouseman from his contract, although rendering any "exceptions clauses" (r) inoperative, does not necessarily displace the whole contract, including an arbitration clause in it (s).

Two things are clear, however, viz., first, that the onus of satisfying the Court of the existence of sufficient reason for refusing a stay falls upon the party who is seeking to by-pass the submission (t) and, secondly, that the onus must be fully discharged (u).

Perhaps the most urgent reason to present to the Court for refusing a stay is that the dispute involves charges of a personal character against the party who opposes the stay, and who desires the charges to be investigated in open Court (a), *provided that the charges were not within the contemplation of such party when he entered into the arbitration agreement* (b). If they were within such contemplation, the Court will grant the stay and leave the truth or otherwise of the charges to be determined in the arbitration. The most frequent of these charges of a personal character is *fraud*, and s. 24 (3) of the Act provides that where the Court gives leave to revoke an arbitration agreement under s. 24 (1) on the ground of possible bias in the arbitrator, or under s. 24 (2) on the ground that the dispute involves a question of *fraud* (c), the Court may refuse to stay any action brought in breach of the arbitration agreement. Of such importance does the Court consider the ventilation in open Court of charges of fraud that it may refuse to stay an action brought in breach of an arbitration agreement even at the instance of the

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*ab initio*, e.g., that it was illegal (see the judgment of Simon, L.C., in the decision cited). The question, therefore, would appear to be whether the party seeking the stay has included repudiation of the arbitration clause in his repudiation of the contract, and the answer would depend on a consideration of the terms of the repudiation, the terms of the contract (including those of the arbitration clause), and the circumstances of the case. In the case of "frustrated" contracts, since the Law Reform (Frustrated Contracts) Act, 1943, provides that "Court" shall include "arbitrator", it would seem that frustration of a contract does not determine an arbitration clause contained in such a contract, and that the clause remains operative for the purpose of the adjudication of differences arising under the Act.

(r) *Ante*, p. 626.

(s) *Woolf v. Collis Removal Service*, [1947] L. J. R. 1377; [1947] 2 All E. R. 260, (C. A. (applying *Heyman v. Darwins* (*supra*)).

(t) *Duleman v. Oasett Corporation*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092.

(u) "The parties having come to an agreement to refer, such agreement must be considered binding between them, and ought not lightly to be overturned": *per* Lord Hatherley, L.C., in *Kitchen v. Turnbull* (1871), 20 W. R. 253.

(a) *Miniffe v. Railway Passengers' Assurance Co.* (1881), 44 L. T. 552.

(b) *Cook v. Catchpole* (1864), 11 L. T. 264.

(c) See *ante*, p. 789

party who is making the charges, but only where "at least a *prima facie* case of fraud has been made out to its satisfaction" (d).

- If the Court grants a stay of the action as to one part of the dispute and refuses it as to another part, the arbitration will proceed as to the part in respect of which the stay is granted.

If, or so far as, the Court refuses a stay of the action, the arbitration agreement, if the arbitration tribunal has not been actually constituted, will cease to have effect, and if it has been constituted, it becomes *functus officio* (e).

Arbitrators must themselves act and cannot delegate their authority to each other. If there is more than one each must use his own judgment in the case and must not accept the opinion or decision of one of the others and an arbitrator cannot make an award contrary to his own judgment. However, an arbitrator may consult and take the opinion of a third party and adopt such opinion as his own (f), he may delegate duties which are purely ministerial, e.g., taking measurements (g), and the duty of taxing costs is delegated to the Taxing Master.

#### SECTION 8.—*Arbitrator and Umpire*

**The Arbitrator.**—The arbitrator is the person to whom the reference is made under a submission.

*Qualifications for appointment—bias.*—Generally speaking, any person may be appointed an arbitrator, but there is a question as to whether this includes a deaf, dumb or blind person, a lunatic, an idiot, an infant, or a felon (h). It is here assumed that a normal person is appointed, and then the only disqualification is possible bias, which, when it arises, does so almost invariably from personal interest in the result of the award to be made by him. For example, under a building contract the architect was to be the arbitrator in any dispute between the building owner and the builder and a dispute arose through an excess of cost over the estimate. It appeared that when the contract was being negotiated the architect had promised, or given his assurance, to the building owner that the estimate would not

(d) Russell, 14th ed., p. 85, citing *Russell v. Russell* (1880), 14 Ch. D. 471. 49 L. J. Ch. 268, and *Workman v. Belfast Harbour Commissioners*, [1899] 2 Ir. R. 234.

(e) So held by a majority of the Court in *Doleman v. Ossett Corporation*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092. See particularly the judgment of Fletcher Moulton, L.J.

(f) *Emery v. Wase* (1803), 2 Ves. 501 (a).

(g) *Thorp v. Cole* (1835), 2 Cr. M. & R. 367.

(h) See Russell, 14th ed., pp. 28, 29.

be exceeded. It was held, at the instance of the builder, that the architect was disqualified from acting as arbitrator in the dispute (i).

The interest may arise *after* the appointment, *e.g.*, where, in a claim under a fire policy, an arbitrator (one of two) appointed by the insured bought the claim from the insured, the award was set aside (k). But the interest must be a concealed interest, *i.e.*, not known at the time of the appointment to the party complaining, *e.g.*, where a party to a submission consented to the appointment of the other party as arbitrator, the appointment was held good (l). In one case, however, a party may obtain relief on the ground of possible want of impartiality even where he was aware, or should have been aware, of it at the time of the appointment, *viz.*, under sub-s. (1) of s. 24 of the Act dealt with previously (m). The disqualifying interest must be something in actual conflict with the appointee's duty as arbitrator. It is not to be assumed that he may decide in favour of a party merely because he might possibly like to be able to do so, *e.g.*, a counsel will not be assumed to be biased in favour of a person from whom he receives briefs (n). Nor is he necessarily disqualified because he happens to be the debtor of, or be indebted to, one of the parties. It depends upon the full circumstances (o). And even the fact that he has already expressed an opinion on the dispute will not disqualify unless he appears to have made up his mind unalterably (p). Objection to an arbitrator should be taken at the earliest moment otherwise it may be held to have been waived by the conduct of the parties.

The foregoing rules as to impartiality apply not only in the case of a sole arbitrator but in the case of each of several arbitrators, one appointed by each party, and the bias of one will vitiate the joint award even if there is no complaint against the other arbitrators (q). One of several arbitrators is not the agent in any way of the one appointing him and he must be qualified and act in all respects as though he were sole arbitrator (r).

(i) *Kimberley v. Dick* (1871), L. R. 13 Eq. 1; 41 L. J. Ch. 38; *Kemp v. Rose* (1858), 1 Giff. 258.

(k) *Blanchard v. Sun Fire Office* (1890), 6 T. L. R. 365.

(l) *Matther v. Ollerton* (1894), 4 Mod. 226.

(m) See *ante*, p. 789.

(n) See *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835; 70 L. J. Ch. 59. Presumably a solicitor would not be presumed to be biased in favour of a client.

(o) Compare *Morgan v. Morgan* (1892), 1 Dowl. 611; 2 L. J. (N.S.) Ex. 56, with *Malmesbury Ry. v. Budd* (1876), 2 Ch. D. 118; 45 L. J. Ch. 271.

(p) *Jackson v. Barry Ry.*, [1893] 1 Ch. 238.

(q) *Burton v. Knught* (1705), 2 Vern. 515.

(r) See *Re Templeman & Read* (1841), 9 Dowl. 962.

Nevertheless, in commercial arbitrations where there are two arbitrators and an umpire, there is a tendency on the part of the respective arbitrators to "play for the side" and this tendency seems to have some judicial sanction, although to what extent is uncertain (s).

*Official Referee.*—Although the person appointed an arbitrator must act judicially, he need not be a judicial person. If this is desired, the parties may select an Official Referee (t) as arbitrator and s. 11 of the Act provides that any Official Referee to whom application is made shall, subject to any order of the Court as to transfer or otherwise, hear and determine the matters agreed to be referred. The wording of the section implies that the reference is to the Official Referee as *sole* arbitrator, and it does not appear that he can be appointed as one of several arbitrators, nor does the section permit of his appointment as *umpire*.

*Nomination of arbitrator.*—The arbitrator or arbitrators may be nominated in the submission itself, *i.e.*, expressly *named*, *e.g.*, "Mr. A., Chartered Accountant", or *designated*, *e.g.*, "a person appointed by the president for the time being of the Law Society". But if the submission does not do this it is for the parties to agree upon an appointment afterwards, and it is also for the parties to agree upon a fresh appointment if an existing one fails to become, or ceases to be, effective through refusal of the appointee to accept office or by reason of his incapacity or death. Where the parties cannot agree the Act makes provision for solving the deadlock, which will be given later. When the arbitrator is not named or designated in the arbitration agreement itself, the appointment should be made in writing since it might be argued that the appointment, although made after the agreement, is really part of it, which (if it is to be within the Act) must, by definition, be in writing (u).

*The Umpire.*—The umpire is a person appointed to decide where the arbitrators are an even number and they are equally divided as to the proper finding. What has been said as to the qualification of an arbitrator applies equally to an umpire. Unless

(s) See *French Government v. S.S. Tsurushima Maru* (1921), 37 T. L. R. 961, and *Bourgeois v. Weddell & Co.*, [1924] 1 K. B. 539; 93 L. J. K. B. 282. But in *Roff v. British & French Chemical Manufacturing Co.*, [1918] 2 K. B. 677; 87 L. J. K. B. 996, Swinfen Eady, M.R., strongly denied the propriety of arbitrators in commercial disputes acting as advocates before the umpire for their respective appointors.

(t) See *ante*, p. 781, note (a).

(u) See *ante*, p. 781.

the umpire is named or designated in the arbitration agreement, it is the arbitrators, and not the parties, who select him and the approval of the parties is not required (a). The selection must be made upon due consideration of fitness and not haphazard, as by lot (y). The appointment, where no other method is prescribed by the agreement, may be made in any manner, even by parol (a). Usually it is made in writing under the signatures of the arbitrators. If the person appointed refuses the office, the arbitrators may make another appointment, but, once he has accepted, the appointment cannot be revoked except by the Court. The umpire's functions begin when, and not before, the arbitrators disagree, but to save time and duplication of evidence he may sit with the arbitrators and make notes of the evidence for his own purposes in case he should be called upon to act. He must not, however, interfere in any way with the hearing, which is that of the arbitrators and not of him (b). The umpire, if he has to act, does not take up the case where the arbitrators left off and cannot confine himself to points upon which the arbitrators have been unable to agree (c). He must decide afresh all points, even those upon which the arbitrators are agreed, but the parties themselves may agree upon points and so save him the labour of deciding them (d). If he does not sit with the arbitrators he must start *de novo*, and hear the witnesses over again (e). In the hearing before him he has all the powers and duties of an arbitrator.

An umpire must be distinguished from a *third arbitrator*. By s. 9 of the Act, where the arbitration agreement provides merely for three arbitrators the decision is by majority, but where it provides for three arbitrators, one to be appointed by each party and the third to be appointed by the other two, the third so appointed is to be deemed an umpire and not an arbitrator.

By s. 8 (1) of the Act (f), unless the agreement provides to the contrary, if the reference is to two arbitrators they must appoint an umpire immediately after their own appointment, and by s. 8 (2) (g) if the arbitrators have notified in writing to a party

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- (r) *Oliver v. Collings* (1809), 11 East 367.  
 (y) *Young v. Miller* (1824), 3 B. & C 407; 3 L. J. (o.s.) K B. 54.  
 (a) *Oliver v. Collings*, *supra*.  
 (b) See *Flag Lane Chapel v. Sunderland Corporation* (1859), 5 Jur. (N.S.) 891.  
 (c) *Winterringham v. Robertson* (1858), 27 L. J. Ex. 301.  
 (d) *Re Salkeld and Slater* (1840), 12 A. & E. 767; 10 L. J. Q. B. 22.  
 (e) *Ibid*.  
 (f) *Ante*, p. 786.  
 (g) *Ante*, p. 787.



to the agreement, or to the umpire, that they cannot agree, the umpire may forthwith\* enter on the reference in lieu of the arbitrators. And in a proper case the umpire may be made to displace the arbitrators before they have completed the arbitration or even before they have entered upon it, s. 8 (3) of the Act, providing that "at any time after the appointment of an umpire, however appointed, the High Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator". A "proper case" would occur where s. 8 (2) (given above) is excluded by the express terms of the arbitration agreement or if not excluded is not complied with, for the purpose of resolving the consequent deadlock.

As in the case of arbitrators, the Act contains provisions for filling vacancies in the office of umpire when the arbitrators cannot agree upon an appointment and in certain other cases. These provisions are included in the ensuing paragraphs of this section.

**Replacement of Arbitrators and Umpire.**—Where at Common Law the arbitration could not be proceeded with in certain circumstances, *e.g.*, by failure of the parties to agree upon an arbitrator, or where the reference would come to a premature end, *e.g.*, by death of the arbitrator or umpire, the Act provides a remedy to meet most of such cases, and it may be said generally that where persons have agreed to submit their dispute to arbitration the agreement need not become frustrate for want of the necessary adjudicator.

By virtue of s. 10 the Court may appoint an arbitrator or umpire or third arbitrator as may be necessary in the following four cases:—

(i) Where the arbitration agreement provides for a single arbitrator (*h*) who is not named or designated in the submission and the parties cannot agree upon an appointment. This does not apply until differences have arisen, and one party cannot be asked by the other to concur in appointing in advance, *e.g.*, under an arbitration clause in a contract before a difference has actually arisen.

(ii) Where a person appointed as sole arbitrator refuses to act, or is incapable of acting, or dies, and the parties do not concur

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(*h*) Including the case where the reference is *deemed* to be to a single arbitrator by virtue of s. 6 of the Act (see *ante*, p. 786).

upon a fresh appointment. The arbitration agreement may, however, indicate an intention that the vacancy in such case is not to be filled, and the present provision will not then apply.

(iii) Where *two* arbitrators have been appointed and (a) the *parties* are at liberty to appoint a third arbitrator or an umpire or (b) the *arbitrators* are at liberty to appoint a third arbitrator or are at liberty or *required* (i) to appoint an umpire, and in any such case appointment is not made.

(iv) Where the third arbitrator or umpire is in fact appointed and refuses to act, or is incapable of acting, or dies, and the parties or the two arbitrators, as the case may be, who have made the appointment do not concur in filling the vacancy. As in (ii), this provision will not apply if the arbitration agreement indicates that the vacancy is not to be filled.

*Procedure.*—To invest the Court with power to appoint in the above cases, one of the parties must serve the other parties or the arbitrators, according to which of these should have made the appointment, with a written notice to appoint an arbitrator, or third arbitrator or umpire as the case may be, and if the parties served do not make or concur in the making of an appointment within seven clear days after service of the notice, the Court may make the appointment, and the appointee shall have the same powers in the reference and in making an award as though he had been appointed by consent of all parties.

Where the reference is not to a single arbitrator but to *two* arbitrators, *one to be appointed by each party*, the procedure is different. In such case, s. 7 of the Act provides, (i) that if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may substitute a new arbitrator in his place, and (ii) that if one party fails to appoint an arbitrator in the first instance or, on refusal to act or incapacity or death of the appointee, fails to appoint a substitute in accordance with (i), the other party (provided he has made his own appointment) may appoint his own appointee to be *sole* arbitrator and his award is binding as though he had been appointed by consent of both parties (k). But before the other party makes the appointment he must serve the defaulting party

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(i) By s. 8 (1) of the Act, they must appoint an umpire immediately after their own appointment (*ibid.*).

(k) It should be observed that there must be a *fresh* appointment of the existing appointee. He cannot act merely because the other appointment has not been made (*Drummond v Hamer*, [1942] 1 K. B. 352). It should be observed further that the provision referred to has no application to the appointment of an *umpire*, who, in the absence of the necessary concurrence, must be appointed by the Court under s. 10, *ante*, p. 798.

with notice to make the appointment and the defaulting party then has seven clear days in which to remedy his default (1).

*Appointment after removal by High Court.*—In a proper case the Court may set aside an appointment made by a party under either (i) or (ii). If it does so, it may replace the arbitrator removed under the powers conferred by s. 25 of the Act, now to be dealt with.

By s. 25 (1) when there are several arbitrators and less than the whole of them (m) are removed by the Court, or when an umpire *who has not entered on the reference* (n) is so removed, the Court, on the application of any party to the arbitration agreement may replace by fresh appointment the arbitrator or arbitrators or umpire so removed.

It will be observed that the sub-section does not include provision to meet the position where a sole arbitrator or all the arbitrators or an umpire *who has entered on the reference* is or are removed. Such position is met by s. 25 (2) which provides that in such cases, *and also where the authority of an arbitrator or arbitrators or umpire is revoked by the Court*, the Court may either appoint a person to act as sole arbitrator in place of the person or persons removed, or order that the submission shall cease to have effect.

By s. 25 (8) it is provided that a person appointed under either of the above sub-sections as an arbitrator or umpire shall have power to act in the reference and to make an award as though he had been appointed under the terms of the arbitration agreement.

As regards the provision in s. 25 (2) that the Court may in the circumstances there given order that the submission shall cease to have effect, any attempt to circumvent this by a provision in the arbitration agreement or otherwise that an award under the agreement shall be a condition precedent to the bringing of an action is overridden by s. 25 (4) which provides that where the Court orders that the arbitration agreement shall cease to have effect, it may further order that the condition precedent

(1) The notice may not include or be supplemented by an appointment conditional on the defaulting party not remedying his default. If it does, the notice is bad, since the right to appoint does not arise until the seven clear days have expired (*Drummond v Hamer*, [1942] 1 K. B. 352; 111 L. J. K. B. 385).

(m) I.e., in ordinary cases one out of two, or one or two out of three.

(n) The Act does not say when an umpire is deemed to have entered on the reference, but s. 8 (2) (see *ante*, p. 787) provides that an umpire *may* enter on the reference when the arbitrators have delivered to any party to the submission or to the umpire himself a notice in writing stating that they cannot agree. And in *Iossifoglou v Coumataros*, [1941] 1 K. B. 396; 110 L. J. K. B. 54, it was held that two arbitrators have entered upon the reference once they have accepted the appointment and communicated with each other.

referred to shall also cease to have effect. And it is important to observe that this sub-section is of *general application*, as it expressly provides that if the Court orders "*whether under this section or any other enactment*" that an arbitration agreement shall cease to have effect as regards any particular dispute the Court may further order that any provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

#### SECTION 4.—*Conduct of the Arbitration*

It should be noted that there is no difference between an arbitrator and an umpire in the conduct of an arbitration. An umpire's qualifications and disqualifications, his rights, powers, discretions, and duties are precisely the same as those of an arbitrator, and throughout the remainder of this Part the expression "arbitrator" is to be taken as including "umpire" unless the context indicates the contrary.

An arbitrator must, first of all, see that his appointment is in order and ascertain whether the agreement contains a condition precedent to be performed before the hearing, *e.g.*, a view of the premises in dispute, and duly comply with it, otherwise his award may be set aside (o).

The general course of an arbitration is in fundamentals, and even in general aspect, that of a trial by the ordinary Courts. As already indicated, an arbitrator administers the same substantive law (p), applies the same rules of interpretation and of evidence (q) and observes the same principles of justice as does an ordinary Judge (r). For example, he must receive evidence and not rely upon evidence other than that adduced by the parties (s) or upon his own inspection of premises or goods, as a mere valuer may do (t).

But it is well settled that where parties select an arbitrator, or agree to arbitrate under the rules of a chamber of commerce under which the arbitrator is appointed for them, and the

(o) *Spencer v. Eastern Counties Ry.* (1839), 7 Dowl. 697.

(p) "It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances" (Russell, p. 272, citing *Jager v. Tolme*, [1916] 1 K. B. 989; 85 L. J. K. B. 1116).

(q) *East and West India Docks Co. v. Kirk* (1887), 12 App. Cas. 738; 57 L. J. Q. B. 295, *Re Enoch and Zaretsky, Book & Co.*, [1910] 1 K. B. 827; 79 L. J. K. B. 363.

(r) *Re Gregson and Armstrong* (1894), 70 L. T. 106

(s) *Owen v. Nicholl*, [1948] 1 All E. R. 707, C. A.

(t) *Ousald v. Earl Grey* (1855), 21 L. J. Q. B. 69.

- arbitrator is chosen or appointed because of his knowledge and experience of the trade, such arbitrator can always act on his own knowledge with regard to questions of quality and matters of that description without having expert evidence on these matters before him. The same principle applies where such arbitrator decides a question of damages (u).

The arbitrator must disclose to the other side all information received by him from either side (a), he must not hear one side in the absence of the other (b), and he must appoint a proper time and place for hearing (c). Not only must justice be done by the arbitrator, but should manifestly be done; e.g., an arbitrator was removed on account of remarks by him suggesting preconceived views of the truthfulness of witnesses because they belonged to a certain nationality (d). The arbitrator must decide on the disputes submitted and no more. Where the matter is one of discretion, e.g., in granting an adjournment, the arbitrator's decision will not be disturbed so long as the discretion was exercised honestly and not upon a wrong principle, and, although erroneously, not so unreasonably as to conduce to injustice (e). It has been suggested that an arbitrator has greater latitude than an ordinary Judge so as to enable him to do complete justice (f), but this suggestion is of doubtful validity, and if there is any such latitude it is of very small extent and an arbitrator would be ill-advised to rely upon it (g). But "a party to an arbitration cannot be allowed to lie by and then, if the award is unfavourable, seek to set it aside on the ground that during the proceedings the arbitrator gave a ruling contrary to the rules of evidence which the party during the proceedings took no steps to question" (h). If an arbitrator does not act according to law he is guilty of misconduct within the meaning of s. 28 (1) of the Act, which provides that "where an arbitrator or umpire has misconducted himself or the proceedings the High Court may remove him" (i).

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(u) *Medterranean and Eastern Export Co. v. Fortress Fabrics (Manchester)*, [1948] 2 All E. R. 186.

(a) *Re Camillo Eitzey and Jowson & Sons* (1896), 40 Sol. Jo. 438.

(b) *Oswald v. Earl Grey*, *supra*.

(c) *Re Enoch and Zaitzley, Book & Co.*, [1910] 1 K. B. 327; 79 L. J. K. B. 363. (d) *The Catalina and Norma* (1938), 82 Sol. Jo. 698.

(e) *Laichin v Ellis* (1862), 11 W. R. 281.

(f) Lord Thurlow in *Knox v. Symmonds* (1791), 1 Ves. Jun. 369, at p. 370.

(g) See *Andrews v. Mitchell*, [1905] A. C. 78; 74 L. J. K. B. 833.

(h) Russell, p. 272, citing *Re London Dock Co. and Shadwell* (1862), 7 L. T. 381.

(i) "Misconduct" within this provision does not imply any moral stigma. It may mean no more than merely "breaking the rules".

The powers of the arbitrator to facilitate the hearing and do justice to the parties are contained in s. 12 (1) of the Act (*k*), which after a specific statement of certain things to which the parties and persons claiming through them must submit provides that they must "do all other things which during the proceedings on the reference the arbitrator or umpire may require". Under this provision the arbitrator may, for example, order pleadings (points of claim or defence), particulars thereof (*l*), discovery of documents and interrogatories (on oath if the arbitrator thinks it desirable (*m*)), inspection of property and things by the parties or by the arbitrator himself (*n*), the place and time of hearing, and generally all other matters and things to assist him and the parties in the conduct of the proceedings.

S. 12 (2) of the Act (*o*) provides that if the arbitrator or umpire thinks fit the witnesses may be examined upon oath or affirmation and s. 12 (8) of the Act confers upon the arbitrator or umpire (unless the arbitration agreement expresses a contrary intention) power personally to administer the oath to or take the affirmations of the parties and witnesses appearing. The Perjury Act, 1911, provides that any person who knowingly gives false evidence in an arbitration is guilty of perjury and may be dealt with accordingly.

*Powers of Court in aid of arbitration.*—The extensive powers given to an arbitrator today are, however, subject to limitations as compared with the powers of the Court. He cannot, for example, require a party to give security for costs, unless the submission otherwise provides (*p*). Nor can he order evidence to be taken on commission (*q*); or appoint a receiver (*r*); or grant an injunction; or issue subpoena of witnesses; or commit for contempt as his tribunal is not a Court of Record. He may, however, order specific performance of any contract except one relating to land or any interest in land, this power being given

(*k*) *Intc.* p. 787.

(*l*) *Phillips v. Phillips* (1878), 4 Q. B. D. 127; 48 L. J. Q. B. 185.

(*m*) *Kursell v. Timber Operators and Contractors*, [1928] 2 K. B. 202; 92 L. J. K. B. 607.

(*n*) *Munday v. Black* (1861), 30 L. J. C. P. 193. But inspection by the arbitrator does not enable him to dispense with evidence on the state of the thing viewed (*London General Omnibus Co. v. Lozell*, [1901] 1 Ch. 185; 70 L. J. Ch. 17).

(*o*) *Intc.* p. 787.

(*p*) *Re Unione Steamerie Lanza and Weiner*, [1917] 2 K. B. 558; 86 L. J. K. B. 1236.

(*q*) *Re Shaw and Ronaldson*, [1892] 1 Q. B. 91; 61 L. J. Q. B. 141.

(*r*) *Lingood v. Eade* (1742), 2 Atk. 501.

him by s. 15 of the Act (s) unless the submission itself excludes this power.

But where the powers of an arbitrator fall short of those necessary to do complete justice the Court will supplement them. For example, the effect of s. 12 (4) and (5) of the Act is to enable a party to an arbitration to obtain from the Court a subpoena *ad testificandum* or *duces tecum*, or *habeas corpus* to bring up a prisoner for examination before the arbitrator or umpire. And s. 12 (6) of the Act expressly provides that the Court, in relation to an arbitration, shall have the same power of making orders in respect of certain matters as the Court has in relation to an action or matter in the Court. The matters in question are as follows :—

- (1) Security for costs :
- (2) Discovery of documents and interrogatories :
- (3) The giving of evidence by affidavit :
- (4) Examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction :
- (5) The preservation, interim custody or sale of any goods which are the subject-matter of the reference :
- (6) Securing the amount in dispute in the reference :
- (7) The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence :
- (8) Interim injunctions or the appointment of a receiver.

To meet any case where the powers of the arbitrator and of the Court overlap, *e.g.*, in (2) above, the section provides that the powers of the Court shall not prejudice those of the arbitrator or umpire. The result of this provision no doubt is that if a party should ask the Court for something which he could obtain from the arbitrator the Court would refuse to grant it unless otherwise just and convenient in the circumstances.

#### SECTION 5.—*The Award*

When the arbitrator has heard the evidence and arguments he declares the proceedings closed and proceeds to consider and make

his award. The arbitrator is not bound to make an award though he may have held several meetings and he can only make one award. When the award is made the parties are notified that it is ready for delivery and they are notified of the arbitrator's fees. Either party may take up the award and the party who applies first and pays the fees gets the original stamped copy, the other party receiving an unstamped copy.

**Form of award.**—At Common Law an award might be oral (t). Paragraph (c) of the implied provisions under the Act of 1889 provided that the arbitrators should make their award in writing within a prescribed period, but the paragraph has been repealed by the Act of 1934. Presumably, therefore, an arbitrator may today at once deliver his award orally or call the parties together later and deliver it then. The result is that if it is desired to ensure an award in writing provision for that purpose should be made in the arbitration agreement. This is rarely done, but nevertheless the award is in practice invariably in writing. When in writing, it requires to be stamped 10s. (u). It may take any form, at the discretion of the arbitrator, and in practice varies from a reasoned judgment similar to that of a Judge of the High Court to a bare statement of findings.

Recitals in the award are not essential but it is desirable to include them because they explain the award, the authority for what has been done and the due performance of duty. Recitals should show what the arbitrator's authority is, the subject-matter of the reference, the powers exercisable by the arbitrator, the powers that have in fact been exercised and the performance of conditions imposed by the agreement. The arbitrator cannot give himself powers beyond the agreement by including a false or inaccurate recital in his award though such an untrue recital will not invalidate the award (a).

To be valid an award under the Act—

- (a) must be in writing stamped 10s. :
- (b) must be certain and clearly indicate the arbitrator's decision :
- (c) must be final and conclusive : •
- (d) must decide all the matters referred and *only* those matters :
- (e) must decide as regards all the parties to the agreement :

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(t) *Cocks v. Macclesfield* (1662), 2 Dyer 218 b.

(u) Revenue Act, 1906, s. 9.

(a) *Watkins v. Phillpotts* (1825), M'Clel. & Y. 398.



- (f) must conform with and not exceed the powers as set out in the reference :
- (g) must not extend to strangers :
- (h) must be legal :
- (i) must be reasonable, consistent and possible.
- If there are two arbitrators they should sign at the same time and place, as in the event of an interval one may have changed his mind (b). If there are three arbitrators the signature of two is sufficient as section 9 (2) of the Act provides that the award of two out of three arbitrators shall be binding.

**Time limit for making award.**—No time limit is imposed by law (although it may be by the terms of the agreement) for the making of the award (any more than for entry upon the reference), section 18 of the Act expressly providing (c) that “an arbitrator or umpire shall have power to make an award at any time”, except when it has been remitted for reconsideration (d), but the section referred to (e) provides that the Court may on the application of any party remove an arbitrator or umpire who fails to use reasonable dispatch in entering on and proceeding with the reference and making the award. If so removed, he is not entitled to remuneration for anything he may have done. “Proceeding with the reference” includes, in cases where there are two arbitrators and they are unable to agree, giving notice of the fact to the parties and the umpire. If the agreement fixes a time for making the award, section 18 (2) of the Act provides that the Court may enlarge the time, and the application for enlargement may be made even after the time fixed has expired. Where the stipulation is that the award “should be ready to be delivered” by a specified date, it merely requires that it should be ready for delivery. The fact that it is not actually delivered by that date will not effect its validity (f). It is ready to be delivered as soon as it has been duly made. But where the stipulation is that the award “shall be delivered” by a named date, actual delivery is then essential to its validity.

**Interim award.**—It may sometimes be desirable in an arbitration to come to a decision upon certain of the questions without delay, *e.g.*, to decide the question of liability, leaving that of

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(b) *Wade v. Dowling* (1854), 4 E. & B 44; 23 L. J. Q. B 302

(c) Sub-s. (1).

(d) See *post*, p. 808.

(e) Sub-s. (3).

(f) *Brown v. Vowser* (1804), 4 East 584.

quantum of damages to be decided later. To meet such a case s. 14 of the Act (g) (unless excluded by the arbitration agreement) provides that the arbitrators or umpire may make an *interim* award. An interim award is as much an award as a final one and all provisions of the Act relating to awards apply to interim awards (h).

**Finality of award.**—Under s. 16 of the Act (i) (unless the contrary is provided by the arbitration agreement) an award is final and binding on parties and all persons claiming under them. This is, of course, subject to the power of the Court to set the award aside or to send it back for reconsideration (k). Unless otherwise stated in the agreement, the arbitrator's authority begins from the time he enters upon the reference. It ends either when the award is made or on the expiration of the time, or extended time if any, when it should have been made or when the arbitrator's authority is revoked. So far as the arbitrator is concerned, having made his award he is *functus officio*, except (i) for the power conferred upon him by section 17 of the Act to correct "any clerical mistake or error arising from any accidental slip or omission", and (ii) under section 18 (4) of the Act by adding a direction as to costs (l).

**Setting aside award.**—Bearing in mind that "misconduct" does not necessarily imply moral delinquency (m) and may mean anything from actual corruption to mere error of judgment, the law under the present heading can be said to be summed up in section 28 of the Act (n) which provides that "where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award *has been improperly procured*, the Court may set the award aside". The misconduct may occur before entering on his duties, *e.g.*, having interviews on the subject of the differences, after accepting his appointment, with one party in the absence of the other; or during the proceedings, *e.g.*, improperly receiving or rejecting evidence; or in the framing of the award, *e.g.*, drawing unwarranted conclusions from the facts found by him. An award has been set

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(g) *Ante*, p. 787.

(h) This is the effect of s. 21 (3) of the Act of 1934.

(i) *Ante*, p. 787.

(k) This is dealt with later.

(l) See *post*, p. 812.

(m) *Phipps v Ingram* (1835), 3 Dowl. 669

(n) Sub-s. (2).

aside, *inter alia*, for being bad in point of law on the face of it (o); for failing to decide all the issues (p); for gross carelessness in the conduct of the proceedings (q); for not applying his mind to the matters before him (r); for improperly refusing an adjournment (s); for accepting a bribe (t). These are merely a few of innumerable examples, and it may be said that the Court will set aside an award whenever it is satisfied that to allow the award to stand would be contrary to natural justice (u).

Application to set aside the award must be made within six weeks after the making and publication of the award to the parties, *i.e.*, six weeks from the date when the party applying was notified that the award had been published and not from the date when he first learnt of its contents. The Court has power to extend this time limit on sufficiently strong grounds being shown. The application to set aside must state, in general terms, the grounds of the application and is made by motion to the Divisional Court in the King's Bench Division or to the Judge in Court in the Chancery Division.

**Remitting an award.**—On the other hand the Court will not set aside an award unless it takes the view that a miscarriage of justice will or may occur if the award is allowed to stand, since it is not the policy of the Court to interfere with a tribunal voluntarily chosen by the parties, *e.g.*, the Court refused to accede to an application to set an award aside on its being convinced that the applicant had not suffered by reason of an admitted error on the part of the arbitrator (a). And this reluctance on the part of the Court to set aside an award is strengthened by the power conferred upon it by section 22 of the Act (b) which provides in effect that the Court may remit the award or any part of it to the reconsideration of the arbitrators or umpire.

This reluctance was clearly illustrated in the case of *Kiril Mischeff v. Constant Smith & Co.* (c), a case where there was

(a) *Landauer v. Assef*, [1905] 2 K. B. 184; 74 L. J. K. B. 659; *Clark v. Carters* (1944), 170 L. T. 417.

(p) *Kilburn v. Kilburn* (1845), 18 M. & W. 671; 14 L. J. Ex. 160.

(q) *Re Hall and Hinds* (1841), 2 M. & G. 847; 10 L. J. C. P. 210.

(r) *Flynn v. Robertson* (1869), L. R. 4 C. P. 324; 38 L. J. C. P. 240.

(s) *Whatley v. Morland* (1883), 2 Dowl. 249; 3 L. J. (N.S.) Ex. 58.

(t) *Shephard v. Brand* (1784), 2 Barnard 463.

(u) *Re Templeman* (1841), 9 Dowl. 962; 6 Jur. 324.

(a) *Bignall v. Gale* (1841), 10 L. J. C. P. 169.

(b) Sub-s. (1).

(c) *Kiril Mischeff v. Constant Smith & Co.*, [1950] 1 All E. R. 890.

an error of law on the face of the award. The Court, on a motion to set aside the award, refused to do so but referred the matter back to the arbitrators for further consideration.

Where this is done the same section provides (d) that, unless otherwise directed in the order of remission, the fresh award must be made within three months after the date of the order. This time may be extended by the Court under section 18 (2) of the Act referred to previously (e).

It may be mentioned that when application is made to set aside an award, section 28 (3) of the Act provides that the Court may order any money made payable by the award to be brought into Court or otherwise secured pending the determination of the application.

There are four grounds for remitting an award (f) :—

- (a) where the award is bad on the face of it (g) :
- (b) where there has been misconduct on the part of the arbitrator :
- (c) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, and
- (d) where additional evidence has been discovered after the making of the award.

Where the whole of the award is remitted for reconsideration, it becomes altogether void and the original powers of the arbitrator, who was *functus officio*, are revived. His second award will now be a new award. The remission may be to the same or a different arbitrator, *e.g.*, where there is a suggestion of bias (h). But where the reference back is only for amendment of such parts as are bad, the arbitrator's powers are revived only for the defective parts and he cannot alter the rest (i).

**Enforcement of award.**—Section 26 of the Act provides that an award may *by leave of the High Court* be enforced in the same manner as a judgment or order to the same effect, and where such leave is given, judgment may be entered in terms of the award. The result of leave being granted is that the award

(d) Sub-a. (2).

(e) *Ante*, p. 806.

(f) *Per Chitty, L.J.*, in *Re Montgomery, Jones and Liebenthal* (1898), 78 L. T. 106.

(g) *Kiril Mischeff's Case* (*supra*) should be referred to for a discussion by the Court of the principles to be applied where there is an error of law on the face of the award.

(h) *Re Tidswell* (1863), 33 Beav. 217.

(i) *Johnson v. Latham* (1851), 20 L. J. Q. B. 238.

becomes a final judgment for all purposes whatsoever, including, *e.g.*, the grounding of a bankruptcy notice. Application by originating summons for leave to enforce the award may be made at any time and even though the time for moving to set it aside has not elapsed (*k*). The award may be enforced by execution, which is the most usual method, by an action for specific performance or by attachment.

It may be mentioned further that by section 20 of the Act a sum directed to be paid by an award carries interest as from the date of the award and at the same rate as a judgment debt, unless the award otherwise directs. But this section gives an arbitrator no power such as is contained in s. 8 (1) of the Law Reform (Miscellaneous Provisions) Act, 1984, to award interest *as from the date upon which the debt or damages arose* except by agreement of the parties (*l*).

#### SECTION 6.—*Special Case*

So that justice may be done under an arbitration agreement, the Court exercises its powers in relation thereto in the following ways—

- (i) By revocation of the arbitration agreement in whole or in part.
- (ii) By removal of arbitrator or umpire, thus creating a vacancy in the office.
- (iii) By filling vacancies in the office of arbitrator or umpire.
- (iv) By refusing, wholly or in part, to stay an action brought by a party in breach of an arbitration agreement.
- (v) By setting aside the award or by remitting it, wholly or in part, to the arbitrator or umpire, for reconsideration.
- (vi) By ordering the arbitrator or umpire to state a “Special Case” for the Court’s decision.

All except (vi) have already been dealt with, and this now falls to be considered.

Section 21 of the Act provides (*m*) that an arbitrator or umpire may, and shall if so directed by the High Court, state (i) any question of law arising in the course of the reference, or (ii) the award itself, or any part of it, in the form of a Special Case for the decision of the Court. The section further

(*k*) R. S. C. Order 42, r. 31A.

(*l*) *Podar Trading Co. v. Tagher*, [1949] 2 K. B. 277 : [1949] L. J. R. 1470, D. C.

(*m*) Sub-s. (1).

provides (n) that the foregoing shall apply to an *interim* award and to a question of law arising in the course of a reference, notwithstanding that proceedings under the reference are still pending. Finally the section provides (o) that the Court's decision on a case stated shall be deemed a judgment of the Court within the meaning of section 27 of the Judicature (Consolidation) Act, 1925, which enables (p) the decision of the Court to be taken to the Court of Appeal (q), but, as regards a case stated on a point of law arising in the course of the reference as distinct from one stated in the award itself, only with the consent of the Court or of the Court of Appeal.

**Comparison with High Court procedure.**—Special case in arbitration may be compared with special case in proceedings in the High Court under R. S. C., Order 84, which is a mode of obtaining a judicial decision on a statement of facts submitted to the Court by the parties without the aid of pleadings. In the latter, however, it is the parties who concur in stating the case and the Court cannot order them to state it. In form and effect, however, the two classes of case are the same and the provisions of rule 1 of Order 84 may be quoted as applicable to both classes.

“Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.”

**Right to statement of Special Case.**—It is to be observed that the statute does not say that the arbitrator *must* state a case, it merely provides in effect that he may do so of his own accord or, if he is asked and refuses, application may be made to the Court for an order. Consequently, it is not misconduct on his part to refuse to state a case, but it may be misconduct if, on refusing, he also declines to grant an adjournment so that the

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(n) Sub-s. (2).

(o) Sub-s. (3).

(p) As was not the case under the corresponding provisions of the Act of 1889.

(q) And thence (with consent of the Court of Appeal or House of Lords) to the House of Lords.

party may have an opportunity of applying to the Court (r) or if he agrees only to state a case upon improper conditions, e.g., demand of an exorbitant sum for expenses (s).

• It is also to be observed that the right to statement of a Special Case is not one of the implied provisions of a submission, but is conferred expressly by the statute and cannot be contracted out of (t).

**After award.**—Finally, it may be pointed out that once the arbitrator has made his award, he is *functus officio* (u) and cannot state a special case (a). In such event the Court must be asked to revoke the award or to remit it for reconsideration under s. 22 of the Act (b).

#### SECTION 7.—Costs

By s. 18 (1) of the Act (c) the costs of the reference and award (including the arbitrator's own reasonable fee) are in the discretion of the arbitrator (d). But the right of the parties to contract out of this paragraph is limited by s. 18 (8) of the Act, which provides that any provision in an arbitration agreement to the effect that the parties or any party shall pay their or his own costs or any part thereof *in any event* shall be void, unless such provision has been entered into *after* the dispute has arisen, e.g., such a provision is void if embodied in an arbitration clause in a contract. Directions as to costs should be given in the award and, if omitted, section 18 (4) provides that any party may within fourteen days of the publication of the award (or such further time as the Court may order) apply for such directions and the arbitrator must, after hearing any party who may desire to be heard, amend his award by adding such directions.

The arbitrator may insist upon payment of his fee before delivering his award. He has the right to fix the fees he considers proper for his trouble. He has a lien for his costs on

(r) *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131; 67 L. J. Q. B. 1.

(s) *Re Enoch and Zaretsley, Bock & Co.*, [1910] 1 K. B. 327; 79 L. J. K. B. 363.

(t) *Re Reinhold and Hansloh* (1896), 12 T. L. R. 422; *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478; 92 L. J. K. B. 81.

(u) Except in the two respects given, *ante*, p. 807.

(a) *Re Palmer & Co. and Hosken & Co.*, *supra*

(b) *Ante*, p. 808.

(c) *Ante*, p. 787.

(d) The arbitrator must exercise his discretion in the same manner as a Judge, and must have reasonable grounds for depriving a successful party of costs (see *Rosen & Co. v. Dowley & Selby*, [1943] 2 All E. R. 172).

the award and submission and may retain them until paid (e), but he has no lien upon documents put in evidence (f). Where the party who takes up the award and pays the costs is not the party ultimately liable to pay, he can recover from the other the amount the award directs as payable (g). But s. 19 of the Act provides that if the party asking for delivery considers the fee demanded to be excessive, he may apply to the Court for an order for delivery of the award subject to payment into Court of the fee demanded by the arbitrator, and that the fee be taxed by a taxing officer of the Court. After taxation, the amount at which the fee is taxed is paid out to the arbitrator and the balance (if any) is returned to the applicant. On such taxation, the arbitrator is entitled to be heard. The foregoing provision will not apply if the fee, as is frequently the case, has been previously fixed by agreement with the parties. And in any event where the parties have chosen their own arbitrator, they must pay the rate usually charged for by professional men of experience and standing unless, of course, the charges are shown to be extortionate (h).

By s. 18 (5) of the Act it is provided that a solicitor shall have the same right to a charge for his costs upon the property recovered or preserved in the arbitration as he has in the case of an action in the Courts under s. 69 of the Solicitors Act, 1932.

#### SECTION 8.—*Statutes of Limitation in relation to Arbitration*

Section 16 of the Act of 1934 contained some important provisions affecting the application of the statutes of limitation to proceedings by arbitration. These have for the most part been repealed, but re-enacted by s. 27 of the Limitation Act, 1939.

Since the statutes of limitation, generally speaking, operate by barring action on the claim, not by annihilation of the claim itself, and since arbitration is not an action, it was matter for argument whether a party to an arbitration could plead the statutes in question by way of defence. In spite of a decision that he could do so (i) a doubt remained. The matter has now been set at rest by the Act of 1939 which provides (k) that "This

(e) *Re Coombs* (1850), 4 Ex. 389.

(f) *Ponsford v. Swaine* (1861), J. & H. 133.

(g) *Hicks v. Richardson* (1797), 1 B. & P. 93.

(h) *Llandrindod Wells Water Co. v. Hawksley* (1904), 68 J. P. 242.

(i) *Re Astley and Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252. Had this been a House of Lords decision, the statutory provision referred to would have been unnecessary.

(k) Sub-s. (1) of s. 27, re-enacting, in effect, sub-s. (1) of s. 16 of the Act of 1934.



Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions in the High Court”.

Where (l) a contract contains a provision that no action shall be brought upon it until the amount of liability has been settled by arbitration, it was decided (m) that time did not begin to run under the statute of limitations until the arbitrator had made his award. The Act of 1939 provides (n) that in such a case the cause of action shall be deemed to have accrued at the time when it would have accrued but for the provision in the contract referred to. The result is that if the claim is (the contract not being under seal) more than six years old, the defence can plead the statutes of limitation notwithstanding any provision in the contract that no cause of action is to accrue until the amount payable under the claim has been ascertained by arbitration.

Sometimes a contract containing an arbitration clause provides that, unless a party claiming under the contract institutes arbitration proceedings within a certain time, his claim shall be barred. The contention was put forward in a certain case that such a provision was against public policy, but the contention was not upheld (o). The Act (p) provides that where such a provision would work hardship the Court may, on such terms as justice may require, extend the time for instituting the arbitration proceedings for such period as the Court may think proper.

Finally, the Act of 1939 (q) provides that where after the commencement of an arbitration the Court revokes the submission or, after an award is made, orders that it be set aside, the Court may further order that the period between “the commencement of the arbitration” and the date of the order of revocation or setting aside shall be excluded from the computation of the time prescribed by the statutes of limitation for the commencement of proceedings in respect of the dispute involved. In other words, the Court may order that the effective date for the purposes of the statute of limitations shall be the commencement of the arbitration proceedings. For this purpose the Act of 1939

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(l) As in *Scott v. Avery* (1856), 5 H. L. C. 811; 25 L. J. Ex. 308: see *ante*, p. 782.

(m) *Board of Trade v. Cayzer, Irvine & Co.*, [1927] A. C. 610; 96 L. J. K. B. 872.

(n) Sub-s. (2) of s. 27, re-enacting, in effect, sub-s. (1) of s. 16 of the Act of 1934.

(o) *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.*, [1922] 2 A. C. 250; 91 L. J. K. B. 518.

(p) S. 27.

(q) Sub-s. (5) of s. 27, re-enacting sub-s. (7) of s. 16 of the Act of 1934.

provides that the arbitration shall be deemed to have commenced when one party serves on the other party a notice requiring him to appoint an arbitrator, or, where the arbitrator is named or designated in the submission, when one party serves on the other a notice requiring him to submit the dispute to the person so named or designated (r). The notice required may be served in any manner provided in the submission or in the alternative (a) by delivery to the other party in person or (b) by leaving it at his usual or last known place of abode in England or (c) by registered letter addressed to such place of abode, and in the last mentioned case, service shall be deemed to have been effected at the time when the letter would have been delivered in the ordinary course of post (s).

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(r) Sub-s. (3) of s. 27, re-enacting sub-s. (4) of s. 16 of the Act of 1984.  
(s) Sub-s. (4) of s. 27, re-enacting sub-s. (5) of s. 16 of the Act of 1984.



## INDEX

### A.

ABATEMENT of nuisance, 386

ABROAD, torts committed, 279

ACCEPIANCE of goods, 689, 687  
of offer. *See* CONTRACTS, simple.

ACCIDENT, inevitable, 271  
insurance, 575  
meaning of, under National Insurance (Industrial Injuries) Act, 1944  
...538

ACCOMMODATION parties to a bill of exchange, 746

ACCORD and satisfaction, 275

ACCOUNT stated, 77

ACT of God, 271  
of State, 267

ACTIONS, of Assumpsit, 9, 17, 18  
of Case, 7, 8, 9, 18  
of Covenant, 8, 18  
of Debt, 8, 18, 234  
of Deceit, 107  
of Detinue, 6  
of Ejectment, 7  
of Replevin, 8  
of Trespass, 8  
of Trover (or Conversion), 9  
on the case, 7  
real, personal and mixed, 7

APPELLOPMENT, bills of lading, 619  
form of, 619  
functions of, 621  
Carriage of Goods by Sea Act, 1924...680  
responsibilities and liabilities of carrier under, 680  
rights and immunities of carrier under, 682  
charterparties, 614  
conditions and warranties in, 616  
form of, 614-616  
obligations of charterer, 617  
contracts of, 618  
duties and powers of master, 684  
freight, 623. *See also* FREIGHT.  
immunities of the shipowner as carrier, 682  
implied undertakings by shipowner, 628  
by shipper, 629  
liabilities of shipowner as carrier, 626  
persons who may sue and be sued, 685  
statutory limitation of liability, 628

AGENCY. *See* PRINCIPAL AND AGENT.

AGENT, general and particular, 468  
of necessity, 473  
*See also* PRINCIPAL AND AGENT.

AGREEMENT, for arbitration, 164  
for sale or other disposition of land, 54, 57  
made in consideration of marriage, 55  
not to be performed within one year, 55  
parties to, 24  
*See also* CONTRACTS; UNLAWFUL AGREEMENTS.

AIR, right to access of, 358

ALIENS, contracts of, 144  
with, effect of war on, 145-146  
in tort, 260

ANIMALS, liability in respect of, 392  
of dangerous animals, 393  
of owner for trespass of, 393  
where *scienter* can be proved, 394  
straying on highways, 397

APOTHECARIES, 158

APPROPRIATION of payments, 217

ARBITRATION Act, 1950...778 *et seq.*  
agreement, enforcement of, 790  
requisites of valid, 781  
revocation of, 787  
agreements to refer to, 164  
award under, 804  
enforcement of, 809  
form of, 805  
interim award, 806  
setting aside award, 807  
compared with action, 801  
conduct of, 801  
powers of the Court in references to arbitration—  
by consent out of Court, 780  
under order of the Court, 781  
under statutory powers, 780  
special case, right to statement of, 811  
statutes of limitation in relation to, 813

ARBITRATOR, bias of, 794  
nomination of, 796  
official referee as, 796  
when appointed by the Court, 798

ARREST by private individual, 811  
by constable, 811, 812  
justification for, 811

ASSAULT and battery, 305  
defences to action for, 307

- ASSIGNMENT of contract, 192
  - of liabilities, 192
  - of moneylenders' debts, 200
  - of rights, 198
    - equitable assignments, 197
    - under Law of Property Act, 1925...195
      - absolute and not by way of charge only, 195
      - in writing, 196
      - notice in writing, 197
      - of a debt or legal chose in action, 196
      - subject to equities, 197
- ASSUMPSIT, action of, 9, 17, 18, 19
- ASSURANCE Companies Act, 1946...553
- AUCTION sales, 675
- AUCTIONEERS, 489
- AVERAGE, general and particular, 566, 567
- B.
- BAILMENTS, definition and classification of, 583
  - delivery of possession of goods, what constitutes, 583
    - by attornment, 583
  - duties of bailee, 584
  - duty of bailee, 585
  - for valuable consideration, 588
  - gratuitous, 587
  - how created, 583
  - "special property" of bailee, 584
- BANK notes, 723
- BANKERS, protection of, on payment of cheques, 771
  - relationship to customers, 767
- BANKRUPTCY, discharge in, 275
  - proceedings, malicious institution of, 413
- BARE licence, 819
- BARRISTERS, rights and liabilities of, 150
- BATTERY. *See* ASSAULT.
- BENEFITS, under National Insurance Act, 538
  - injury, 538
  - disablement, 539
  - death, 540
- BETTING and Loans (Infants) Act, 1898...183
- BILLS of exchange, acceptance, 737
  - and payment for honour, 764
  - accommodation party, 746
  - bills in a set, 765

**BILLS of exchange, capacity and authority of parties, 741**

- case of need, 741
- computation of time, 735
- conflict of laws, 766
- consideration, 744
- date, rules as to, 735
- definitions, 726
- delivery, 739
- discharge of bill, 762
- dishonour by non-acceptance, 752
  - by non-payment, 755
  - notice of, 755
- duties of holder, 759
- forged signatures, 741
- form and interpretation, 726
- forms of, 726
  - rules as to, 730
- holder for value, 745
  - in due course, 747
- inchoate instruments, 739
- indorsement, 748
- liabilities of parties, 759
- lost instruments, 765
- measure of damages, 761
- negotiation, 748
  - duration of negotiability, 750
  - of overdue and dishonoured bills, 750
  - to party already liable, 751
- noting and protesting, 758
- presentment for acceptance, 751
  - payment, 753
- presumptions of value and good faith, 747
- procuration signatures, 742
- rights and powers of holder, 751
- signature, 741-744
- signatures by agents, 743
- special stipulations by drawer or indorser, 736
- transferor by delivery, 762

**BILLS of lading. See AFFREIGHTMENT.**

**BILLS of Sale Acts, 704**

- application of Acts, 704
- consideration for bill of sale, 710
- defeasances and conditions, 712
- definition of bill of sale, 705
  - personal chattels, 704
- form of security bill, 716
- inventory, 719
- registration, 710
- requisites of form, 715
- seizure of chattels, 719

**BONA fide holder for value, 724**

**BONDS, 70**

**BOTTOMRY contracts, 634**

- discharge of rights of action created by, 226
    - by accord and satisfaction, 226
    - by release, 226
    - by Statutes of Limitation, 226
  - distinguished from tort, 246
  - equitable remedies for, 244
  - inducing breach of contract, 398
  - See also* DAMAGES; INJUNCTION; SPECIFIC PERFORMANCE.
- BRITISH Transport Commission, 595
  - executives, delegation of functions to, 595
- BROKERS, 488
- BURDEN of proof, in actions of contract, 28
- C.
- CABS, hiring of, 303, 304
- CAPACITY to contract, 128 *et seq.*
- CARRIAGE of Goods by Sea Act, 1924...680
- CARRIERS Act, 1890...602, 604
  - of goods, 595
  - See also* COMMON CARRIERS; RAILWAYS.
- CASE, action of, 8, 18
- CASUAL delegation, 299
- CATTLE, liability in respect of, 392
- CAVEAT emptor, rule of, 647
- CHAMPERTY, 415
- CHANCERY, origin of the Court of, 4
- CHARTERPARTIES. *See* AFFREIGHTMENT.
- CHEQUES, crossed cheques, 769
  - duty of bankers as to, 771
  - definition of, 766
  - presentment for payment, 769
  - protection of bankers, 771
  - relation of banker and customer, 767
- CHILDREN, contributory negligence of, 377
  - liability of occupiers of premises to, 387
  - parents for contracts of, 132
  - See also* INFANTS.
- CHOSES in action, assignment of, 193
- C.I.F. contracts, 665



CIVIL employment, reinstatement in, 512

CLUBS, contracts on behalf of, 147

COLLISIONS at sea, contributory negligence in, 377

COMBINATIONS to injure, 400

COMMON carriers, action against, 601  
     definition of, 596  
     duration of liability, 600  
     liabilities at common law, 597  
     limitation of liability by statute, 602  
         special contract, 604  
         stipulations, 599  
     obligations of, 597  
     *See also* RAILWAYS.

COMMON employment, defence of, 526  
     abolition of, 527

COMMON Law, Courts of, 1, 2  
     history of, 1  
     meaning of, 5

COMPENSATION under Lord Campbell's Act, 287  
     the Employers' Liability Act, 1880...531  
     the Workmen's Compensation Acts, 531, 532

COMPOSITION between a debtor and his creditors, 215

CONDITIONS concurrent, 205  
     in charterparties, 616  
     in contracts for sale of goods, 643  
     precedent, 205  
     promissory, 225  
         distinguished from representations, 102  
         warranties, 225  
     subsequent, 189

CONSIDERATION. *See* CONTRACTS.

CONSTRUCTION of documents, 90  
     for the Court, 92  
     intention of parties, 93  
     must be favourable, 96  
         liberal, 96  
         reasonable, 95

CONTRACT and tort, division of personal actions into, 8

CONTRACTOR, liability for acts of, 300

CONTRACTS, acceptance, 34  
     communication of, 35  
     must be complete and unqualified, 37  
     affected by mistake, 118  
     assignment of, 192  
     basis of the law of, 6  
     burden of proof in, 23

**CONTRACTS**, by correspondence, 40  
 classification of, 20  
 Common Law actions of, 17  
 consideration, 21, 41  
     adequacy, 46  
     by whom it must be furnished, 42  
     distinct from moral obligation, 44  
     executed or executory, 43  
     failure of, 51  
     in contracts of record, 84  
     in specialty contracts, 72  
     inadequacy, 47  
     legal value, 46  
     must move from promisee, 42  
     past consideration, 43  
     promise to third party, 49  
     reality of, 47  
     waiver of legal right, 50  
 counter-offer, 36  
 different classes of, 20  
 essentials of, 20  
 executed and executory, 20  
 express, 20  
 for which deed required, 74  
 formation of, 26  
 implied, 20, 67  
 inferred, 74  
 joint, 25, 26  
 legal requirements, 20  
 nature of, 17  
 offer, 27  
     communication of, 29  
         by conditions on tickets, etc., 30  
     revocation and lapse of, 32, 33  
     what constitutes, 27  
 of record, 20, 82  
     characteristics of, 85  
 operation and effect of, 99  
 parties to agreement, 24  
 quasi-contracts, 17, 76  
 reference to formal contract, 39  
 simple, 24  
     formation of, 26  
 specialty, 20, 68  
     characteristics of, 71  
 survival of cause of action, 233  
 unenforceable, 22  
     *consensus ad idem*, 37  
     joint or several liability, 26  
     postal communications, 36  
     what are, 22-23  
 valid abroad but void by English law, 136  
 void and voidable, 22  
     *See also MISREPRESENTATION AND FRAUD.*  
 when a contract must be by deed, 74  
 writing, when required for simple contracts, 52  
*See also ASSIGNMENT OF CONTRACT; BREACH OF CONTRACT; DIS-  
 CHARGE OF CONTRACT; GAMING AND WAGERING CONTRACTS;  
 STATUTE OF FRAUDS; UNLAWFUL AGREEMENTS.*

**CONTRIBUTION**, between tortfeasors, 264

CONTRIBUTORY negligence, 371

Act of 1945...378

in collisions between ships, 377

of children, 377

CONVERSION. *See* DETINUE AND CONVERSION.

CONVEYANCES, fraudulent, 72

CONVICTS, 144, 260

CO-OWNERS of chattels, 327

of land, 317

CORPORATIONS, capacity to contract, 146

characteristics of, 147

contracts of, 146

different kinds of, 146

liability in tort, 260-261

right to sue in tort, 260

what constitutes, 147

CORRESPONDENCE, contracts by, 40

COUNTERCLAIM, 220

COUNTER-OFFER, in contract, 36

COUNTY Court, powers of, 15

COVENANT, action of, 8, 18

CREDIT, fraudulent representations as to, 420

CROWN Proceedings Act, 1947...261-263

to sue and be sued in tort, right of, 261

## D.

DAMAGES for breach of contract, 235

general and special, 237

rules for assessment of, 235

liquidated, 242

remoteness of, 238

for tort, 232

remoteness of, 234

vindictive damages, 234

DAMNUM *absque injuria*, 14, 354

DANGEROUS animals, 392

things, liability in respect of, 389

duties to third persons, 390

DEBT, action of, 8, 18, 234

DECEASED persons, liability for causing death, 237

survival of rights of action of, in contract, 233

in tort, 230

INCEIT. action of, 18, 107, 420

DEED. contracts for which required, 74  
delivery as escrow, 69  
execution of, 68  
signature of, 69

DEFAMATION, 425

damage is presumed, 433  
defences. apology, 448  
fair comment, 437  
justification, 436  
privilege, 438  
absolute, 438  
malice, 447  
qualified, 440  
evidence in mitigation of damages, 448  
innuendo, 431  
special damage, when necessary, 449  
what the plaintiff must prove, 425  
of and concerning the plaintiff, 426  
of defamatory matter, 430  
publication, 426

DEFENCE in answer to Statement of Claim, 18  
of person, 272  
of property, 272  
to Counterclaim, 18

DEFENCES in tort, 267 *et seq.*

DEFINED and known channel, stream flowing in, 351

DEL CREDERE agent, 489

DELIVERY of bill of exchange, 739  
of goods sold, 662

DEFURAGE, 618

DENTISTS, 154

DETINUE, action of, 8  
and conversion, 324  
conversion, 326  
by agent, 328  
damages for, 332  
defences to an action for, 331  
detinue, 324  
*jus tertii*, 331  
who may maintain an action, 329

DISCHARGE of bill of exchange, 762  
of contract by agreement, 203  
by breach, 221  
by impossibility created by promisor, 221  
of performance, 207  
by non-performance, 223-225  
by operation of law, 207  
by payment, 213  
*See also* PAYMENT.

DISCHARGE of contract by performance, 218  
 by repudiation by the promisor, 221  
 by subsequent agreement, 226  
 under term of original contract, 204  
 of rights of action, 226-229  
*See also* BREACH OF CONTRACT.

DISHONOUR of bills of exchange, 752, 755

DISPARAGEMENT of goods, 449

DISTRESS damage-fessant, 319  
 excessive, 333  
 illegal, 333  
 irregular, 334

DOCTORS. *See* MEDICAL PRACTITIONERS.

DOCUMENTS, construction of, 90  
 principal rules governing, 92

DRIVERS and vehicles, hire of, 302

DRUNKEN persons, contracts of, 143

DURESS, 115  
 contract voidable, 115

## E.

EASEMENTS and natural rights, acquisition of, 350  
 interference with, 350  
 rights in respect of water, 351  
*And see* WATER.  
 rights of support, 355  
*And see* SUPPORT.  
 rights of way, 358  
 rights to air, 357  
 rights to light, 357

EJECTMENT, action of, 7

EMPLOYERS' Liability Act, 1880...526, 531  
 amount of compensation, 531  
 conditions for maintenance of action, 531  
 effect of the Act, 531  
 repeal of, 527, 532  
 when applicable, 531

ENTICING away servants, 406  
 wives, 405

EQUITABLE fraud, 111  
 unconscionable bargains, 112  
 loans, 112  
 undue influence, 114

ESTOPPEL, 71  
 by record, 87, 89

EXCESSIVE distress, 838

EXCHUQUE bills, 723

EXECUTED and executory consideration, 48  
contracts, 20

EXECUTIVE acts, in tort, 269

EXPRESS contracts, 20

## F.

FACTORS, 468  
Act, 1889...660

FAIR comment, 437

FALSE imprisonment, 309  
defences to action for, 311

FATAL Accidents Acts (Lord Campbell's and others), 287  
assessment of damages, 289

FELONY, agreement to compound, 166

FIDUCIARY relationships, 108, 114

FIRE insurance, 570  
assignment of policy, 571  
right of purchaser of property to benefit of policy, 571  
liability in respect of, 389

FOREIGN judgments, 89  
relations, contracts prejudicing, 165

FRAUD, 107, 420  
effect of Statutes of Limitation, 231  
equitable, 111  
unconscionable bargains, 112  
loans, 113  
undue influence, 114  
remedies for, 108

FRAUDS, Statute of. *See* STATUTE OF FRAUDS.  
upon creditors, 73

FRAUDULENT conveyances, 72  
preferences, 73  
representations as to another person's credit, 420

FREIGHT, 623  
advance, 624  
dead, 618  
lien of shipowner, 624  
*pro rata*, 624

FUMIGES *industriales* and *naturales*, 58

FRUSTRATION of contract, 209, 211

## G.

- GAMING and wagering contracts, 178
  - at common law, 179
  - deposits with stakeholders, 183
  - lotteries, 184
  - new promise to pay money lost upon, 185
  - Stock Exchange transactions, 182
  - the Betting Act, 1853...181
  - the Gaming Act, 1845...179, 184
    - 1892...180, 181
  - debts, bonds and securities therefor, 184
    - new contracts in respect of, 185
    - the Gaming Act, 1710...184
      - 1835...184
      - 1845...183
      - 1892...185

GENERAL and particular average, 566, 567

GRATUITY, disablement, 539

## GUARANTEE, 544

- contracts of, 54
- discharge of surety, 549
- distinguished from indemnity, 544
- rescission of contract, 548
- revocation of continuing, 551
- rights of surety, 547
  - as against co-sureties, 547
  - creditor, 547
  - principal, 547
  - what constitutes, 544

## H.

HIGHWAY, animals straying on, 397

- authorities, 258
- misfeasance and nonfeasance as to, 258
- nuisances, 337

HIRE and credit sale, distinction between, 679

Purchase Act, 1938...684

- agreements within the Act, 685
- appropriation of payments, 690
- essentials of the agreement, 686
- exchange of information, 690
- implied terms of agreement, 688
- ineffective provisions, 687
- right of hirer to determine the agreement, 691
  - of owner to determine the agreement, 692
  - to recover possession of the goods, 693
- rights of the landlord, 695

HIRE-purchase agreements, 680

- effects of distress and bankruptcy, 682
- types of, 680

**HIRING** agreements, definition of, 677  
                                     possession under, 678  
                                     rights of owner and hirer, 679  
                                     subject-matter of, 677

**HOLDER** in due course, 721, 747  
                     for value, 745

**HOLDING** out of person as agent, 476

**HUSBAND** and wife, interference with relationship of, 405  
                     cannot sue wife in tort, 260  
                     liability of, for wife's contracts, 187, 490  
                                     torts, 298

I.

**IDENTITY**, mistake as to, 120

**IDIOTS.** *See* **INSANE PERSONS.**

**ILLEGAL** agreements, at common law, 160  
                                     by statute, 160  
                     associations, 147  
                     distress, 338

**IMPLIED** contracts. 20, 71  
                     accounts stated, 77  
                     money due under a statute, 81  
                             paid for defendant at his request, 77  
                             received to the use of the plaintiff, 78

**IMPOSSIBILITY** of performance, 207

**INDEMNITY.** contracts of, 544  
                     distinguished from guarantee, 544  
                     *See also* **GUARANTEE.**  
                     of agent, 166

**INDEPENDENT** contractors, liability for torts of, 300

**INDORSMENT** of bill of exchange, 748  
                     of writ of summons, 12

**INDUCING** breach of contract, 308

**INDUSTRIAL** Injuries Fund, 541

**INFANTS,** contracts of, 128  
                     equitable liability, 136  
                     recovery of money paid under void or voidable contract, 134  
                     to marry, 135  
                     valid, 128  
                             for necessities, 126  
                     void, 132  
                     void under Infants Relief Act, 1874...132  
                     voidable, 133  
                     torts, liability for, 263



INFERRED contracts, 74

INJUNCTION, restraining breach of contract, 245  
tort, 292

INJURIA *sine damno*, 14

INN, what constitutes, 590

INNKEEPERS Act, 1868...598  
Act, 1878...594  
common law liability of, 590  
lien of, 590, 594  
as against whom, 590  
on what goods, 591

INNUEENDO, 481

INSANE persons, contracts of, 148

INSURANCE Commissioners, 542  
definition of, 552  
insurable interest, 557  
is a contract *uberrimæ fidei*, 558  
officer, 541  
subrogation and contribution, 559  
*See also* ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE;  
MARINE INSURANCE; MOTOR VEHICLES; compulsory insurance of,  
and NATIONAL INSURANCE.

INTERFERENCE with contracts of service, 405  
domestic relationships, 405  
easements and natural rights, 350  
exercise of legal right, 398  
freedom of action, 398

INVITEES, liability of occupiers of property to, 386

IRREGULAR distress, 384

## J.

JOINT and several rights and liabilities, 24  
creditors, 206  
debtors, 206  
tortfeasors, 264  
contribution between, 265

JUDGMENTS, 84  
foreign, 89  
of English Courts of Record, 85

JUDICATURE Act, 1878...6  
procedure before, 9

JUDICIAL acts, in tort, 268  
proceedings, reports of, 139

JURISDICTION of the Courts, agreements ousting, 164

*Jus tertii*, 331

JUSTICE, agreements interfering with, 166

JUSTIFICATION for arrest, 311  
     defamation, 485  
     trespass to the person, 305, 308

LACHES, 111

LAND, agreements for sale of, 57

LANDLORD and tenant, duties towards persons on the premises as between, 380  
     liabilities of landlord to tenants, 388

LAW of Property Act, 1925, s. 40...53

LAW Reform (Contributory Negligence) Act, 1945...378, 529, 530  
     (Personal Injuries) Act, 1948...527, 531

LEAVE and licence, 272

LIABILITIES, assignment of, 192

LIBEL, damages in, 433  
     distinguished from slander, 425  
     *See also* DEFAMATION.

LICENCE, 58

LICENSERS, liability of occupiers of property to, 385

LOAN, 697  
     general and particular, 698  
     how lost, 700  
     of agents, 467  
     of innkeeper, 590  
     of solicitor, 496, 497

LIFE insurance, 572  
     amount for which a policy may be effected, 573  
     assignment of policy, 575  
     on whose life and for whom it may be effected, 572, 573

LIFT, right to, 357

IMITATION of actions. *See* STATUTES OF LIMITATION.

LIQUIDATED damages, 212

LORD Campbell's Act, 287  
     assessment of damage, 289

LOTTERIES, 184

LUNATICS. *See* INSANE PERSONS.

## M.

MAIL contractor, 602

MAINTENANCE, 415

justification for, 416

MALICE, 253, 447

MALICIOUS abuse of process, 413

prosecution, 410

absence of reasonable cause, 412

damage must be proved, 410

malice, 413

statements causing damage, 419

MARINE insurance, 559

assignment of policy, 564

general average, 566

liability of insurer, 564

measure of indemnity, 569

partial losses, 566

particular average, 567

return of premium, 570

salvage charges, 568

the contract, 559

the policy, 561

the voyage, 563

warranties, 562

MARKET overt, 657, 658

MARRIAGE, agreement in consideration of, 55

brokerage contracts, 167

contracts affecting freedom and security of, 167

of, by infants, 135

MARRIED women, bankruptcy proceedings against, 142

contracts of, 137

before 1935...137

ante-nuptial contracts, 141

liabilities under, 141

liability of husband for, 141

rights under, 141

at Common Law, 137

restraint upon anticipation, 139

Restraint upon Anticipation Act, 1949...143

under Married Women's Property Acts, 139

Matrimonial Causes Acts, 138

with respect to separate property, 138

under Law Reform Act, 1935...142

restraint upon anticipation, 139

torts, liability for, 264

of husband for, 293

when they can sue husbands in tort, 260

MASTER and servant, classes of servants, 513

contract of employment between, 512

statutes and orders relating to, 513

duration of contract, 514

- MASTER and servant, duties of master to servant, 519
  - payment of wages, 519
  - to employ, 519
  - duties of servant to master, 528
  - effects of termination of contract, 517
  - employment, conditions of, 519
    - insurable, 538
    - reinstatement in, 512
    - registration of, 512
  - formation of contract between, 512, 513
  - liabilities for injuries caused to servant, 524
    - at Common Law, 525
    - defences, 526
      - common employment, 526
      - contributory negligence, 529
      - volenti non fit injuria*, 528
  - liability of master for servant's torts, 298
    - delegation of duty by servant, 295
    - excess or mistake in execution of duty, 296
    - in course of employment, 294
    - loan of servants, 302
    - negligence of servant, 296
    - ratification, 300
    - willful wrong, 297
  - termination of contract, 514
    - dismissal by notice, 514
    - without notice, 516
  - servant leaving without notice, 517
- MEASURE of damages, 235
- MEDICAL practitioners, 153
- MEETINGS, reports of proceedings at, 441
- MEMORANDUM in writing under section 4 of the Statute of Frauds, 52
  - contents of, 59
  - effect of non-compliance with, 67
  - form of, 64
    - when operation is excluded, 67
  - under the Moneylenders Act, 1927...167
  - under section 4 of the Sale of Goods Act, 688, 689
- MERCANTILE agents, 488
  - delivery and transfer of goods by, 660
- MERCHANDISE Marks Act, 1887, warranties under, 651
- MERCHANT Shipping Act, 1894...628, 638
- MERGER of contract, 71, 86
- MINERALS, excavation of, 355
- MISREPRESENTATION. 22, 102
  - contract voidable, 102
  - distinguished from breach of warranty or condition, 102
    - defence of Mistake, 116
    - non-disclosure, 108
  - must be made to induce plaintiff to act, 106

- **MISREPRESENTATION**, must be of fact, 105
  - must have induced the plaintiff to act, 106
  - remedies for misrepresentation and fraud, 108
  - what amounts to, 108
  - when it amounts to fraud, 107
- **MISTAKE**, 116
  - absence of *consensus ad idem*, 117
  - affecting formation of, 118
  - as a defence to an action for specific performance, 123
  - as to a term of the contract known to other party, 122
  - as to identity of other party, 120
  - as to nature of document, 121
  - as to subject-matter, 118, 119
  - contract void, 118
  - distinguished from defence of misrepresentation, 116
  - equitable relief in case of, 123
  - money paid under, 124
    - when not recoverable, 125
  - of expression, 125
  - rectification, 126
- MONEY**, due under a statute, 81
  - had and received, action for, 80
  - paid for the defendant at his request, 77
  - paid under mistake, 124
  - paid under an illegal or immoral agreement, 188
  - received to the use of the plaintiff, 78
- MONEYLENDERS**, 155
  - agreements relating to costs and charges, 159
  - assignment of debts, 198
  - certificate required by, 156
  - contracts of, 157
  - employment of agents, 156
  - interest chargeable, 156, 157
  - licence required by, 155
  - note or memorandum in writing of contract, 157
  - particulars of loan to be supplied, 156
  - within what time proceedings by a moneylender must be commenced, 232
- MONTH**, meaning of, 97
- MORALITY**. agreements contrary to, 163
- MOTOR** vehicles, compulsory insurance of, 576

## N.

- NATIONAL** Insurance Act, 1916...528, 552
- NATIONAL** Insurance (Industrial Injuries) Act, 1916...532-548, 552
  - accident, for purposes of, 533
  - out of and in course of employment, 534
  - Appeal Tribunal, 542
  - benefits under, 538-541
  - claims under, 541
  - Crown and, 543

NATIONAL Insurance (Industrial Injuries) Act, 1946—*cont.*  
 employment, insurable, under, 533  
 special questions under, 543

NATURAL rights, interference with. *See* EASEMENTS AND NATURAL RIGHTS.

NEGOTIABLE instruments, 722

definition of, 726

what are, 722

*See also* BILLS OF EXCHANGE; CHEQUES; PROMISSORY NOTES.

NECESSARIES, contracts for, by infants, 128

NEGLECT, 360

contributory negligence, 371

damages for which defendant is responsible, 370

defences to action of, 371

duties attached to ownership, etc., of property, 380

in respect of animals, 392

*See also* ANIMALS.

dangerous things, 389

fire, 391

to other owners and occupiers, 380

non-natural use of land, 347

towards persons on the defendant's premises, 380

as between landlord and tenant, 380

duty arising out of contract, 381

to children, 387

to invitees, 386

to licensees, 385

to tenants, 388

to trespassers, 382

duty of defendant to avoid injury to plaintiff, 361

to take care, 361

extent of, 361

evidence of negligence, 367

grounds upon which action is maintainable, 360

must be the cause of the damage complained of, 370

*res ipsa loquitur*, 368

what constitutes, 366

what the plaintiff must prove in an action for negligence, 360

where liability for, arises, 364

defendant a bailee, 365

manufacturer, 387

public officer, 365

equal rights in respect of place or subject-matter, 364

operations from which damage may arise, 364

performance of duty, 365

*See also* EMPLOYERS' LIABILITY ACT; MASTER AND SERVANT;  
 WORKMEN'S COMPENSATION ACTS.

NEGOTIABLE instruments, payment by, as a discharge of contract, 216

NON-DISCLOSURE in contracts *uberrima fidei*, 108

NOTICE of assignment of chose in action, 197

NOTING and protesting of bill of exchange, 758

NOVATION, 204

**NUISANCE, 335**

- abatement of, 336
- highway nuisances, 337
- injury to property, 343
- interference with enjoyment of property, 341
- liability for, as between landlord and tenant, 345
- private nuisances, 340
- public and private, compared, 335-336
- nuisances, 337
- who may sue and be sued, 341

O.

**OBSTRUCTION of highways, 337**

**OCCUPIERS, liabilities of.** See NEGLIGENCE.

**OFFER.** See **CONTRACTS**, simple.

## OPERATION and effect of contracts, 99

**OWNERS and occupiers, liabilities of.** *See* NEGLIGENCE.

P.

PARENT and child, interference with relationship of, 406

PARLIAMENTARY proceedings, reports of, 440

PART performance, 223

**PARTIES to an agreement.** 24  
only, may be sued on it, 100  
may sue, 99

**PARTNERSHIP**, assignment of share in partnership, 508  
 consequences of dissolution, 510  
 definition of, 498  
 dissolution of partnership, 509  
 duties and liabilities of partners to each other, 507  
 formation of, 501  
 introduction of new partners, 508  
 liability of partners for debts and obligations, 505  
     • in case of incoming and outgoing partners, 506  
     • for delicts and misappropriation of property,  
        507  
     • to outsiders, 508  
 limited, 502  
 number of partners, 501  
 settlement of accounts on dissolution, 510

**PASSENGERS' luggage, 610**

**PASSING-OFF** actions, 420

PAWNBROKERS, 702

- PAYMENT of debt, 213
  - appropriation of payments, 217
  - composition agreements, 215
  - mode and place of payment, 215
  - payment by negotiable instrument, 216
    - by third person, 215
    - of smaller sum, 214
- PENALTIES, 242
  - distinguished from liquidated damages, 243
- PENSION, disablement, 539
- PERFORMANCE of contract, 213
  - partial, 223
- PERSONAL representatives, actions by and against, of contract, 233
  - of tort, 230
- PLEADINGS, 10-13
- PLEDGES of goods, 700
- POSTAL communications, 36
- PRESSENTMENT of bill of exchange for acceptance, 751
  - for payment, 753
  - of cheque, 769
  - of promissory note, 776
- PRICE maintenance agreements, 174
- PRINCIPAL, liability of, for torts of agents, 293-300
- PRINCIPAL and agent, 451
  - agency of necessity, 473
  - agent and servant distinguished, 451
  - capacity to enter into contract of agency, 452
  - commission of agent, 464
  - contracts for foreign principals, 488
  - creation of agency, 451
  - determination of agency, 485
  - discharge from liability of principal or agent by election of third party to charge the other, 484
  - discharge from liability of third party to principal by settlement with agent, 484
  - duties of agent to principal, 453
    - not to allow his interest and duty to conflict, 458
      - delegate his duties, 453, 457
      - divulge information obtained in course of employment, 462
    - to act in accordance with ordinary course of business, 454
      - with skill and care, 456
    - to keep proper accounts, 455
    - to obey instructions, 454
    - to pay over money received for principal, 456
  - estoppel, 476
  - exceptional rules as to rights and liabilities of principal and agent under the express terms of the contract, 480
  - general and particular agents. ostensible authority of, 468



**PRINCIPAL and agent—cont.**

holding out, 176

indemnity of agent, 466

liabilities of principal to third parties, 467

when agent is acting with express authority, 467

ostensible authority, 468

when authority of agent is known to be limited, 471

liability of principal for agents' torts, see 293-300

lien of agent, 467

mercantile agents, 488

notice to agent, 478

ratification, 478

relationship between agent and third parties, 479

principal and third parties, 467

remuneration of agent, 462

rights of agent against principal, 462

principal against agent accepting bribe or secret commission, 461

third parties, 467

to recover profit made by agent, 461

warranty of authority, 479

what may be done by means of an agent, 458

where agent contracts by deed, 480

personally, 480

is assumed to have contracted personally, 481

is payee of bill of exchange, etc., 480

where name of principal is undisclosed, 482

*See also* AUCTIONEERS; BROKERS; FACTORS; MARRIED WOMEN; PARTNERS;  
SOLICITORS.**PRIVILEGE** absolute, 488

malice, 417

qualified, 440

**PROFIT à prendre**, 58**PROMISSORY** notes, liability of maker, 777

presentment for payment, 776

provisions of Bills of Exchange Act not applicable to, 777

**PROPERTY** Act, 1925, s. 40...58**PUBLIC** Authorities Protection Act, 277

actions against, 277

**PUBLIC** nuisance. *See* NUISANCE.**PUBLIC** policy, agreements contrary to, 169**PUBLICATION** of defamatory matter, 426**Q.****QUANTUM** meruit, 51, 224**QUASI** contracts, 17, 74

nature of, 17

## R.

RAILWAY and Canal Traffic Act, 1854...604-606

\*RAILWAYS, liabilities of, as carriers of goods, 607  
     carriage by water, 609  
     passengers' luggage, 610  
     special contracts, 608  
     standard charges, 610  
     terms and conditions, 608

RAILWAYS Act, 1921...603, 604, 606, 607, 609, 610, 611

RATIFICATION of act of agent, 478

RECOGNISANCES, 82

RECORD, contracts of, 20, 82  
     characteristics of, 85  
     Courts of, 82  
     debts of, 84  
     estoppel by, 87, 89

RECTIFICATION, 125

RE-ENTRY and ejection, as remedy for trespass, 318

REGISTRATION of Business Names Act, 502

RELEASE, 226, 275

REMEDIES for breach of contract. *See* DAMAGES; INJUNCTION.  
     tort. *See* DAMAGES; FATAL ACCIDENTS ACTS; INJUNCTION.

REMOVEDNESS of damage in contract, 288  
     in tort, 284

REPLEVIN, 322  
     action of, 8

REPLY, 13

REPORTS, of judicial proceedings, 440  
     Parliamentary proceedings, 440

REPUDIATION of contract, 221

RES *ipsa loquitur*, 368  
     *judicata*, 87-90

RESALE by unpaid vendor of goods, 671

RESCISSION of contract, 110  
     when impossible, 110

RESTRAINT of trade, combinations of employers, 173  
     workmen, 175  
     consideration, 171  
     contracts in, 168  
     exceptions, 168

- RESTRAINT of trade, modern rules as to, 168  
     in case of employee, 171  
     vendor of business, 171  
     severability of covenants, 172  
     price maintenance agreements, 174  
     reasonable is permissible, 168  
     the Trade Union Acts, 175
- RESTRAINT on anticipation affecting contracts of married women before 1935...139  
     after 1935...143  
     Act, 1919...143
- RETAKING of goods, 324
- REVIVAL of right of action, 232
- RIGHTS of action, discharge of, by accord and satisfaction, 226  
     by Statutes of Limitation, 226  
     *See also* STATUTES OF LIMITATION.  
     survival of, 233
- RIGHTS of way. *See* WAY, rights of.
- RIPARIAN proprietor, rights of, 351
- RYLANDS *v.* FLETCHER, the rule in, 345 *et seq.*

## S.

- SALE of goods, 636  
     acceptance, 639, 667  
     action for price, 672  
     actions for breach of contract, 672  
     agreement to sell, 637  
     auction sales, 675, 676  
     bankruptcy, effect of, 662  
     breach of warranty, remedy for, 674  
     buyer's liability for not taking delivery, 667  
     buyer's right to examine, 666  
     capacity of parties, 638  
     *caveat emptor*, rule of, 647  
     conditions and warranties, 643, 652  
     contract of sale, definition of, 637  
     damages, measure of, 673  
     definition of goods, 636  
     delivery to a carrier, 665  
     description, sale by, 613, 649  
     effects of the contract, 652  
     exclusion of conditions and warranties, 652  
     execution, writ of, effect of, 662  
     formalities of contract, 638  
     future goods, 641  
     instalment deliveries, 661  
     lien of unpaid seller, 663  
     market overt, sales in, 657  
     mercantile agent, sale by, 660, 661  
     merchantable quality, meaning of, 650  
     performance of the contract, 662  
     perished goods, 642, 643  
     price, 643  
     quality of goods, 650

- SALE** of goods, rejected goods, 667  
     re-sale, 671  
     right of disposal, reservation of, 655  
     risk, passing of, 656  
         of goods in transit, 666  
     sample, sale by, 651  
     specified goods, 641, 642  
     specific performance, 673  
     stolen goods, re-vesting of property in, 659  
     stoppage in transit, 669  
     sub-sale or pledge by buyer, 671  
     subject-matter of contract, 641  
     time, stipulations as to, 645  
     title, implied undertakings as to, 645  
     transfer of property, 652-656  
         title, 656  
             by mercantile agents within the Factors Act,  
             1889...660  
             by person in possession of goods or documents  
             of title, 660  
             by sale in market overt, 657  
     unascertained goods, 641, 655  
     unpaid seller's rights against the goods, 668  
     warranties and conditions, 643  
     writing, when is required, 688  
     wrong quantity, delivery of, 663
- SALE** of land, agreement for, 57
- SAMPLE**, sale by, 651
- SCIENFER**, doctrine of, 392
- SILDUCTION**, 407  
     actual or constructive service, 407  
     damages in action for, 409  
     defences to action for, 409  
     loss of services, 408
- SELF-DEFENCE**, 308
- SERVANTS**, classes of, 513  
     enticing away, 406  
     loan of, 302
- SILT-OFF**, 220
- SILVERABILITY** of partly unlawful agreements, 187
- SHIPOWNER**, liability of as carrier, 626
- SIMPLE** contracts. *See* **CONTRACTS**, simple.
- SLANDER**, actionable *per se*, 433  
     distinguished from libel, 425  
     *And see also* **DEFAMATION**.  
     of title, 448  
     special damage, when necessary, 433

- SOLICITORS, 151, 498
  - agreements by, as to remuneration, 151
  - creation of relationship between solicitor and client, 493, 491
  - determination of relationship, 494
  - duties and obligations of, 495
  - lien of, 496-498
  - remuneration of, 151-153
  - rights and powers of, 151
- SPECIALTY contracts, 20
  - characteristics of, 68
- SPECIFIC performance, 244
  - mistake as a defence to action of, 123
- STAKEHOLDERS, deposits with, 183, 189
- STATEMENT of claim, 12
- STATEMENTS causing damage, 449
- STATUTE of Frauds. agreements in consideration of marriage, 55
  - not to be performed within year, 55
  - contract for sale, etc., of land, 57
  - effect of non-compliance with, 67
  - memorandum under, contents of, 59
    - form of, 64
    - signature of, 62
    - when it may be contained in more than one document, 65
  - promise to answer for debt, etc., of another, 54
  - promises by executors, etc., 54
  - section 4 of, 53
  - when its operation is excluded, 67
- STATUTES of Limitation, 275
  - arrears of rent, 228
  - in actions of contract, 227
    - of tort, 275
  - in simple contract debts, 227
  - in specialty debts, 228
  - moneylenders' debts, 232
  - Public Authorities Protection Act, 1893...277
  - revival of right, 227
  - torts, 275
- STATUTORY authority, as defence in tort, 269
  - duties, 255
- STOCK Exchange transactions, 182
- STOPPAGE in transit, 669
- SUBROGATION of insurer, 559
- SUMMONS, Writ of, 12
  - Originating, 12
- SUNDAY, contracts made on, 161

SUPPORT, rights of, 855  
in respect of buildings, 856  
land, 855

\*SURETYSHIP. See GUARANTEE.

SURVIVAL of cause of action in contract, 288  
in tort, 280

T.

TENDER, 218  
of payment, 219  
of performance, 218

THIRD persons, duties to, in respect of dangerous things, 390  
liability for acts of, in tort, 287, 298  
See also MASTER AND SERVANT; PRINCIPAL AND AGENT.

TICKETS, offers contained in, 30

TIME, calculation of, 97  
in construction of documents, 97  
when of essence of contract, 98

TITLE, slander of, 448

TORTS, accident, 271  
accord and satisfaction, 275  
acts of State, 267  
aliens, 260  
basis of the law of, 6  
committed abroad, 279  
damages, 282  
remoteness of, 284  
*damnum sine injuria*, 14, 261, 354  
defence of person or property, 272  
discharge in bankruptcy, 275  
distinguished from breach of contract, 246  
executive acts, 269  
failure to perform statutory duties, 265  
Fatal Accidents Act, 287  
general exceptions to liability and defences, 267  
hire of vehicles and drivers, 302  
husband and wife, 298  
independent contractors, 300  
infants, 263  
injunctive, 292  
joint tortfeasors, contribution between, 265  
judicial and executive acts, 268, 269  
leave and licence, 272  
liability for torts of others, 292  
law in law and in fact, 253  
master and servant, principal and agent, 293  
misfeasance, 259  
non-feasance, 258  
parental, etc., authority, 274  
release, 275  
remedies for torts, 282

TORTS, rules governing liability in tort, 250  
 - servants lent, 302  
 special damage, 254  
 statutes of limitation, 275  
 statutory authority, 269  
 survival of right of action, 280  
 tort founded on contract, 246  
 torts which are crimes, 248  
 who may sue and be sued, 260

TOWAGE, 568

TRADE competition, 400  
 disputes, acts done in contemplation of furtherance of, 404  
 marks, 422  
 restraint of. *See* RESTRAINT OF TRADE.  
 unions, 175, 261  
     cannot be sued in tort, 261

TRANSPORT Act, 1947...595 *et seq.*

TRANSPORT Tribunal, 595

TRESPASS, action of, 8  
     to goods, 321  
         defences to an action for, 322  
     to land, 312  
         defences to an action for, 319  
         remedies distress damage-feasant, 319  
             otherwise than by action, 318  
             re-entry and ejection, 318  
         who may maintain an action for, 316  
     to the person, 305  
         defences to an action for, 307  
         *See also* FALSE IMPRISONMENT.

TRESPASSERS *ab initio*, 315, 322  
 - liability of occupiers of property to, 382

TROVER (or Conversion), action of, 9, 326

TRUCK Acts, 1831, 1840, 1887, 1896...520-522

## U.

UNBRRIME *fidei* contracts, 103

UNCONSCIONABLE bargains, 112  
 loans, 112

UNDUE influence, 114  
 transactions voidable for, 114

UNENFORCEABLE contracts, 22

UNINCORPORATED associations, contracts on behalf of, 149

UNLAWFUL agreements, 160  
 agreements illegal at Common Law, 160  
     by statute, 160  
 valid abroad but void by English law, 186  
     but in furtherance of illegal transaction, 186  
 void at Common Law, 168  
     as affecting freedom of marriage, 167  
     as contrary to morality, 168  
         public policy, 168  
     as in restraint of trade, 168  
     *See also* RESTRAINT OF TRADE.  
     as interfering with justice, 166  
     as ousting the jurisdiction of the Courts, 164  
     as prejudicial to good government, 165  
     as prejudicing foreign relations, 165  
     as tainted by illegality or immorality, 176  
 void by statute, 178  
     gaming and wagering contracts, 178, 184  
     *See also* GAMING AND WAGERING CONTRACTS.  
 consequences of unlawfulness, 185  
 money paid under an illegal or immoral agreement, 188  
 severability of, 187

UNSOUND minds, persons of. *See* INSANE PERSONS.

## V.

VEHICLES and drivers, hire of, 302

VETERINARY surgeons, 154

VINDICTIVE damages, 283

VOID contracts, 22  
     at Common Law, 168  
     by statute, 178

VOIDABLE contracts, 22

VOLENTI non fit injuria, 272

## W.

WAGERING contracts. *See* GAMING AND WAGERING CONTRACTS.

WAR, effect of, on contracts with aliens, 145-146

WARRANTIES distinguished from conditions, 226  
     representations, 102  
     in charterparties, 616, 617  
     in contracts for the sale of goods, 648  
     in marine insurance, 562

WATER, rights in case of artificial watercourse, 353  
     natural stream, 351  
     in respect of, 351



•

WAT, rights of, 353

WIFE. *See* MARRIED WOMEN.

WENDING-UP proceedings, malicious institution, 413

WORKMEN'S Compensation Acts, 526, 531, 532

WRIT, nature of, 6  
of Summons, procedure, 12  
*super odsum*, 7

WRITING, when required for simple contracts, 52

WRONGFUL distress, 333

•





